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APP.

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47385

MEINHARD & COMPANY, a corporation,

Appellant,

v.

MINIATURE MODES, INC., a corporation,

Appellee.

181A^{2d} 178

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a statement of claim and an affidavit in attachment for garments sold to the defendant and asked judgment for \$1,986.19. Under the authority of a writ of attachment the bailiff took possession of certain chattels. By leave of court the plaintiff filed an amendment to its affidavit for attachment averring that the defendant "is about to fraudulently conceal, assign or otherwise dispose of its properties or effects so as to hinder or delay its creditors by effecting a bulk sale of its assets to a new corporation to be owned or controlled by the present owners" of the defendant "at a value substantially less than the value of the assets as declared by the defendant to its creditors on or about July 16, 1957." A trial before the court on the right to maintain the attachment proceeding resulted in a finding for the defendant and a judgment that the writ of attachment be quashed. Plaintiff appeals.

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Plaintiff's theory is that the contemplated bulk sale by the defendant was in effect a fraud upon its creditors and that the attachment is appropriate. The defendant's theory is that there was no fraud in the bulk sale by it and that the sale resulted in a fair and reasonable price and provided a pro rata distribution of the proceeds to its creditors.

The defendant has a leased store at 5551 West Belmont Avenue, Chicago, in which it sells children's wear at retail. Bob Becker is the president and manager. His wife is the secretary and treasurer and is in charge of the books. His wife and he own all the shares of stock. The plaintiff conducts its business from New York City. In support of its argument that the defendant perpetrated a fraud upon the plaintiff, the latter relies heavily on a letter dated July 16, 1957, received by it from the attorneys for the defendant. The letter, when read in its entirety, conveys the thought that the debtor was in financial difficulties and that any attempt to sue it would hinder its efforts in securing a loan. The part of the letter which says that the debtor is solvent and that if the creditors "stand by" for not more than forty days and accept the pro rata share of the money expected to be raised that "all creditors will be paid in full," expressed an opinion. The letter does not tend to prove any fraudulent intent.

The bulk sale was made pursuant to an understanding reached at a meeting attended by attorneys and others who represented creditors of the debtor. The plaintiff was not

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represented. The participants in the meeting, through one of their number, appointed their own experienced professional appraiser. The testimony of the appraiser establishes that the bulk sale transaction was carried out without fraud, that the sale was made for a fair and adequate price and that the proceeds were to be distributed on a pro rata basis among all of the creditors of the defendant. A new corporation was to be organized, the stock in which would be owned by the mother of Mrs. Becker. Most of the money given as consideration for the bulk sale was raised by a mortgage loan made from a bank by Mrs. Becker's mother. There was a full and complete disclosure. There was no evidence of fraud. We cannot say that the court erred in limiting the cross-examination of the defendant. The judgment is affirmed.

JUDGMENT AFFIRMED.

FRIEND, J., and BRYANT, J., CONCUR.

ABSTRACT ONLY.

A

18 I.A. 179^{2d}

47375

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Appellee,)	APPEAL FROM
)	
v.)	
)	
LAURA PATTERSON,)	MUNICIPAL COURT
)	
Appellant.)	OF CHICAGO
)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On June 4, 1956 the defendant, Laura Patterson, while driving her automobile, was involved in a collision with another automobile at the intersection of Michigan Avenue and 14th Street in Chicago, within the corporate limits of the Chicago Park District. Chester Kamuda, a police officer, arriving on the scene following the collision, after interrogating the parties driving the respective cars, gave defendant an arrest slip charging her with driving a vehicle while under the influence of intoxicating liquor. At the same time both parties were ordered to appear at police headquarters for further questioning. Upon their arrival the arresting officer suggested that defendant submit to the Harger Test (more popularly known as the Drunk-O-Meter Test) to determine the alcoholic content of her blood, a suggestion to which defendant consented. Subsequently the People filed an information in the Municipal Court, where trial was had without a jury, resulting in a finding of guilty and assessment of a fine against defendant in the amount of \$100.00 and costs. At the beginning of the trial defendant moved "to quash and strike the notice of traffic violation

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[the traffic ticket]," but no ruling was made on the motion.

Among other points raised on appeal, defendant challenges the sufficiency of the information on which she was tried. It is set forth in the record and clearly states a cause of action under the pertinent statute (Ill. Rev. Stat. 1955, ch. 95 1/2, sec. 144). The offense was set forth with reasonable certainty and charges defendant as follows: Defendant "Did then and there park, drive and operate a certain motor vehicle, to-wit: a Olds., License No. 1794514, Ill 56, upon a public highway of this state, to-wit: Michigan Ave. & 14th St. Situated within the corporate limits of the Chicago Park District aforesaid, and did then and there unlawfully violate section 47 UART, under infl. by Driving a vehicle while under the influence of intoxicating liquors . . ." This sufficiently apprised defendant of the nature of the charge against her, and was sufficient to enable her to prepare her defense; she was charged with an offense with such certainty that it may be pleaded in bar for any subsequent prosecution of the same offense.

Defendant assigns several errors as grounds for reversal, but on oral argument her counsel stated his willingness to base the case on the contention that any chemical analysis for the alcoholic content of the blood is worthless unless it is performed with reasonable accuracy; that the test should be conducted only by persons who are trained and schooled to perform such tests; and that under the requirements of section 5, subparagraph 2, chapter 91

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of the Illinois Revised Statutes 1955, the legislature must have intended the necessary knowledge to treat human ailments; in other words, that the Harger Test must be performed by professional men or in laboratories where personnel is trained and experienced in administering such tests. This is a provision of the Medical Practice Act, and the specific subsection relied on has to do with treating human ailments without drugs or medicines and without operative surgery. The Harger Test, if used, was administered to defendant for the purpose of determining her sobriety; it was not administered in connection with the practice of medicine. An additional and significant consideration is that defendant is here for review on the judgment solely on the common-law record; no bill of exceptions has been filed. Consequently we have no means of ascertaining whether or not the Harger Test of which defendant complains was administered by competent technicians; there is no showing whether or not a physician was present. Defendant merely takes the position that the trial court and this court of review should take judicial notice that the personnel of the Chicago Police Department administered the Harger Test, but without a bill of exceptions we have no way of ascertaining the fact; it may well have been that the test was administered under the direction of a licensed physician, or made in a laboratory of any of the medical schools, clinics or hospitals in Chicago. Moreover, the record is silent as to whether the results of the test were used to determine the presence of alcohol in the blood of defendant. Proof of intoxication may have been

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made by the oral testimony of officers or others present in the police station when defendant arrived and after her arrest. In the circumstances we must assume that the proof satisfied the trial judge.

Defendant also raises a constitutional question predicated upon the contention that the police officer did not inform her that the results obtained from the Harger Test could be used against her as evidence of driving while under the influence of liquor upon trial. Since defendant appealed directly to the Appellate Court, constitutional questions are waived.

For the reasons indicated, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P. J., and BRYANT, J., CONCUR.

ABSTRACT ONLY.

47394

CHARLES J. SHEMAITIS,

Appellant,

v.

LOUISE M. SHEMAITIS and
LE ROY F. FROEMKE,

Appellees.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

18 I.A. ²¹ 179 ²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This is the third appeal by the plaintiff, Charles J. Shemaitis, from decrees entered in previous litigation of the parties. An opinion in former appeals which were here consolidated (Shemaitis v. Shemaitis and Froemke (Abst.), 6 Ill. App.2d 324) discloses that plaintiff and his wife, after being married about four years, separated; that at the time of their separation (July 3, 1947) they owned, as joint tenants, real estate located at 317 Englewood avenue, in Chicago, which was improved with a two-apartment building. During the period of their marital relationship and following their separation, the Shemaitises filed numerous suits which resulted in protracted litigation.

On November 3, 1945 the defendant in this case, Louise Shemaitis, instituted suit against plaintiff and others in the Circuit Court of Cook County (case No. 47-C-14 080) to partition the premises owned jointly. Thereafter, on March 4, 1948, a decree for partition was entered in that proceeding. On March 29, 1948 the commissioner's report was approved, and the property was ordered to be sold. Le Roy Froemke purchased the premises at the judicial sale, and on May 6, 1948 the court approved the sale.



In September 1947, while the partition suit was pending, Louise Shemaitis filed suit against Charles Shemaitis for divorce in Garland County, Arkansas, where the parties had been married. In that suit Charles Shemaitis was served by publication, and Louise Shemaitis obtained a decree by default.

On March 24, 1950 Charles Shemaitis filed a complaint in the nature of a bill of review against Louise Shemaitis and Froemke in the Circuit Court of Cook County; the case was assigned No. 50-C-2 700 and contained two separate causes of action. In the first part of the complaint plaintiff asked that the decree of partition, entered March 4, 1948 in case No. 47-C-14 080, and the sale of the premises to Froemke be set aside because, as alleged: (1) plaintiff was never notified to appear or testify; (2) the sale price to Froemke was inadequate; and (3) no provision was made for plaintiff's alleged homestead and dower rights. In that proceeding Froemke filed a motion, under sections 45 and 48 of the Civil Practice Act (Ill. Rev. Stat. 1957, ch. 110) to strike the complaint. On June 15, 1951 a decree was entered sustaining Froemke's motion to strike cause No. 50-C-2 700 as to him, with prejudice, for want of equity. Thereupon plaintiff filed a petition in the Appellate Court for leave to appeal from this decree. The petition was denied on July 22, 1952; no appeal was prosecuted to review the judgment in case No. 50-C-2 700.

The allegations of the complaint in cause No. 46533, as well as the parties therein, are the same as those of the complaint previously filed by plaintiff in case No. 50-C-2 700. Froemke again

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filed a motion under section 48 of the Civil Practice Act, alleging that the suit involved the same causes of action and the same parties, and was therefore barred by the prior judgment in case No. 50-C-2 700. On May 28, 1954, on Froemke's motion, the complaint was stricken, and the cause dismissed, with prejudice, for want of equity, as to defendant Froemke, and the premises involved were "dismissed from this proceeding." Subsequently plaintiff made a motion to vacate the order of dismissal entered May 28, 1954; that motion was denied June 25, 1954. Plaintiff then appealed from the decree of May 28, 1954 and the order of June 25, 1954.

In the opinion filed in the consolidated cases numbered 46533 and 46641, the third division of the Appellate Court held that a cause of action which has been finally determined is conclusive as to all immediate parties to the suit and all persons in privity with them, and that the judgment in case No. 50-C-2 700 was conclusive and barred plaintiff from again bringing those matters into litigation. *Leitch v. Hine*, 393 Ill. 211, and *C. & W. T. R. R. Co. v. Alquist*, 415 Ill. 537, were cited to support these conclusions.

In the consolidated appeals plaintiff argued that the decree dismissing the cause was defective because it also dismissed the real estate which Froemke acquired as a purchaser at the judicial sale in the partition proceeding. The court in its opinion observed that this provision was undoubtedly placed in the decree so that the first phase of the case which had to do with the interest of Froemke acquired at the judicial sale in the partition suit would not be involved in the second phase of the case which related

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solely to plaintiff's attack on the Arkansas divorce decree, and concluded that the provision of the decree dismissing the real estate was superfluous, but in any event did not prejudice plaintiff; and accordingly, the decree and order appealed from in case No. 46533 were affirmed.

In case no 46641 the record showed that in the second phase of the case the chancellor found that defendant Louise Shemaitis was not a bona fide resident of Arkansas at the time she obtained a divorce decree in her proceeding in that state, and therefore held the decree to be null and void. On June 23, 1954 the court entered a decree drafted by plaintiff's counsel which found, inter alia, that plaintiff had not, in any way, relinquished his dower and homestead rights or any other rights that he had had in and to the premises known as 317 Englewood avenue in Chicago; and that plaintiff was entitled to his dower and homestead rights. Within thirty days after that decree was entered, Froemke filed a motion alleging that the decree affected his rights and that he had received no notice of hearing on the second phase of the case; and when the particular provisions of the decree affecting Froemke's title were called to the attention of the chancellor, he vacated the decree in the second phase of the case, and at the same time suggested to plaintiff's counsel that he "draw a proper decree" by eliminating those provisions relating to alleged rights of dower, homestead and possession of the premises. However, plaintiff refused to make the suggested changes and subsequently filed a motion to vacate the order setting aside the decree. In case No. 46641 plaintiff appealed

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from the order entered October 14, 1954 vacating the decree, and the order of November 12, 1954 denying plaintiff's motion to vacate the former order. As to this phase of the case the Appellate Court held that during the thirty-day period the court could at any time amend or set aside a decree on its own motion or for good cause shown, citing *Barnard v. Michael*, 392 Ill. 130; that all courts of record have inherent power to vacate or set aside judgments or orders during the term time in which they are rendered, and that such power exists independently of any statute and has its foundation in the common law. *Department of Public Works v. Legg*, 374 Ill. 306.

It appears that when the decree was entered in case No. 46641, Froemke was no longer a party defendant in the second phase of the case, and that the first phase, wherein Froemke's rights in the premises were involved, had been completely disposed of. In the circumstances, the Appellate Court held that the chancellor had power to vacate the decree in the second phase within thirty days after its entry on the grounds that the trial court no longer had jurisdiction of Froemke, and that the decree did not affect Froemke's title. For the foregoing reasons the decree and order appealed from in cause No. 46533 were affirmed, and in cause No. 46641 the orders of October 14, 1954 and November 12, 1954 were affirmed as to the defendant Froemke.

More than two years later plaintiff filed his present petition in case No. 53-C-12 992 wherein he alleged that he was not seeking any relief with respect to the property but sought only to have so much of the decree of June 23, 1954 relating to the

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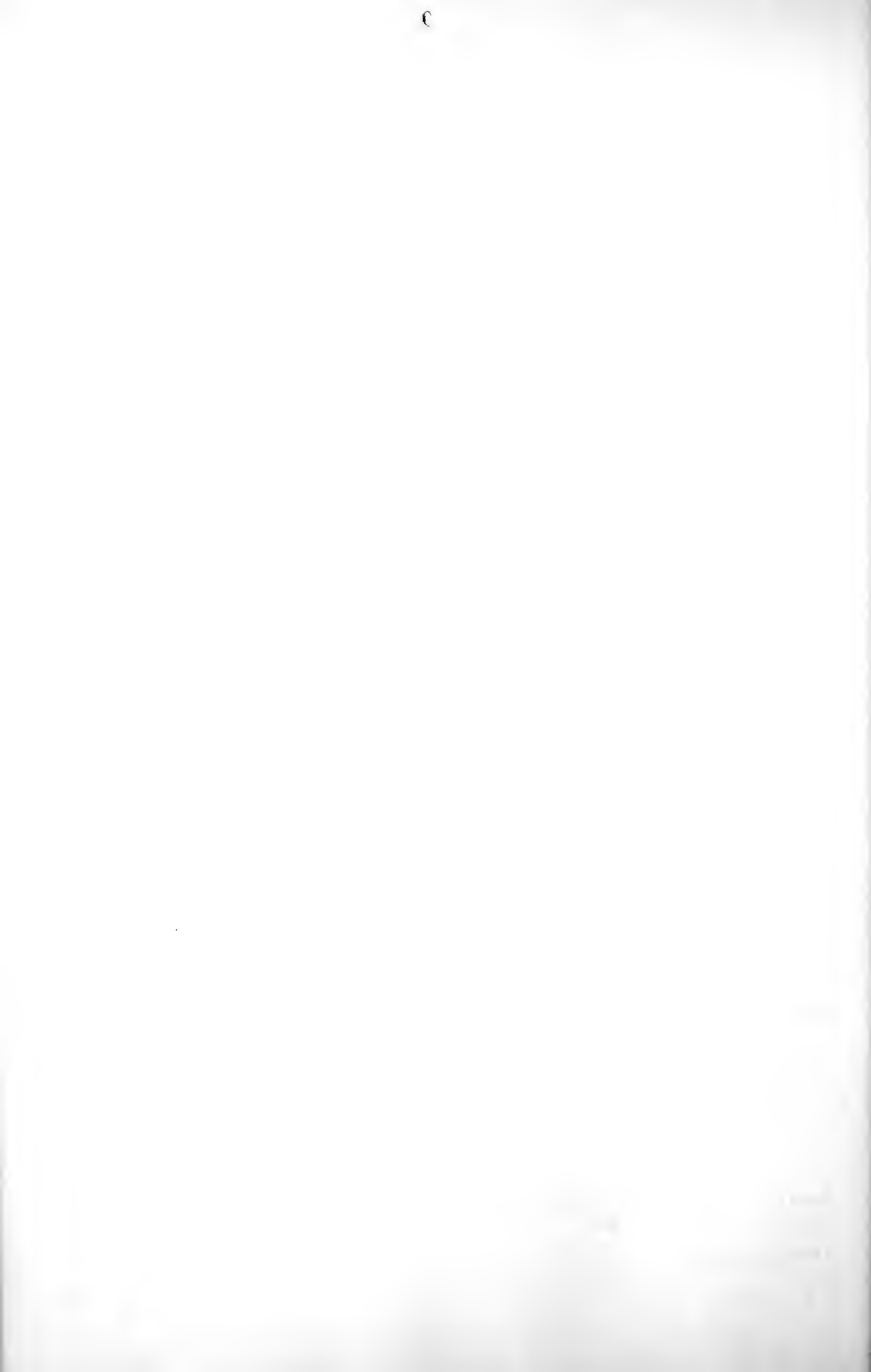
Arkansas divorce decree reinstated, or, in the alternative, asked to have the trial court enter a new decree declaring the Arkansas divorce decree null and void. The hearing on this petition was twice continued during the summer recess, and finally, on September 10, 1957, the motion and petition were denied. Thereafter plaintiff moved to vacate the September tenth order of denial, and on October 7, 1957 that motion was likewise denied. Following those proceedings, plaintiff on November 7, 1957 filed notice of the present (the third) appeal. Louise Shemaitis has filed no brief in this appeal; the only reply brief filed was that of Le Roy F. Froemke.

It is clear that the divorce decree entered in Garland County, Arkansas was invalid; the Circuit Court of Cook County, upon competent evidence, found that the parties resided in Cook County and not in Arkansas when the divorce proceeding was instituted, and that therefore the Arkansas court had no jurisdiction. In view of that finding, the court should not have disturbed that portion of the decree dealing with the invalidity of the Arkansas divorce. Accordingly, the order from which this appeal is taken is reversed, but only in so far as it pertains to the prior order with respect to the invalid divorce decree in Arkansas; and the cause is remanded with directions to allow plaintiff's prayer that the Arkansas divorce decree be held invalid. In all other respects the order is affirmed.

Order affirmed in part and reversed
in part; and cause remanded with
directions.

Burke, P. J., and Bryant, J., concur.

Abstract only.



303
47466

ABE JACOBSON,

Appellee,

v.

HARRY JACOBSON, also known as
HAROLD JACOBSON,

Appellant.

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT,

COOK COUNTY.

18 I.A.^{2d} 180

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In 1936 the plaintiff, Abe Jacobson, and his son, Harry Jacobson, formed a partnership to engage in the jewelry business under the name of A. Jacobson & Son, located at 29 East Madison street, Chicago, Illinois. Plaintiff, who had been engaged in that business for many years, contributed his experience and reputation; defendant contributed \$500.00 in cash. Subsequently controversies arose between the parties, leading up to the instant proceeding. Plaintiff filed a suit in equity for an accounting, declaration of a trust, a temporary injunction, a receiver, and general relief. Immediately thereafter he obtained a temporary injunction; the order provided "that said Injunction issue upon the defendant without bond or notice for good cause shown on the part of the plaintiff herein." The complaint was filed at approximately 2:30 p.m. on February 27, 1958, and in less than an hour the order for an injunction was entered and the writ of injunction served on defendant at the place of business of the partnership. On March 3, 1958 defendant served plaintiff with notice of a motion to vacate and dissolve the injunction. The following day, March 4, 1958, the chancellor denied defendant's motion, and this interlocutory appeal by defendant followed.

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The following day, March 1, 1958, the
defendants' motion, and said interview
followed.

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The material allegations of the complaint, upon which the injunction was predicated, disclose that on December 30, 1947 plaintiff sold defendant a one-quarter interest in the partnership for \$7500.00, evidenced by written agreement of that date. The complaint indicates a controversy between the parties as to whether defendant paid for this interest with his own funds, and also whether the purchase-and-sale agreement was supported by a valid consideration.

The complaint alleges that since the inception of the partnership in 1936 defendant assumed complete management and control of the business, that plaintiff reposed confidence in defendant's business capability, and that a fiduciary relationship existed; that defendant never authorized an audit, that no audit has ever been made, that plaintiff was informed by defendant that the payment for the purchase of the one-quarter interest in the partnership had been complied with, and that he never knew that payment had not been made as agreed; that as a result of the failure of consideration, plaintiff was wrongfully deprived of his share of the profits since January 1, 1948, and that he now seeks a determination and payment thereof; that ill will and dissension has arisen between the parties so that they can no longer work in harmony; that plaintiff made demands for the profits of his alleged one-half interest, as well as for an accounting of all assets of the partnership, but that defendant has wrongfully refused to comply with such demands.

It is further alleged that on February 21, 1958 defendant served notice on plaintiff of his election to dissolve the partnership effective as of February 28, 1958; that plaintiff

has been informed, and on such information believes, that defendant has engaged an auctioneer to conduct a public auction of the stock and inventory of the partnership on or before March 10, 1958; that notice of such auction would appear in newspapers in Chicago at an early date; that defendant stated he proposed to buy back the stock and inventory of the partnership at the auction sale at sixty cents on the dollar; and that plaintiff fears that such public auction, held in bad faith, would result in fraud and irreparable damage to his rights in the partnership. It is further alleged that the assets, stock and inventory of the business consist of cash on deposit in the bank account, accounts receivable, United States Defense bonds, diamonds and valuable metals, totaling in excess of \$32,000.00, all of which are readily divisible and separable, and that the debts of the partnership are comparatively small and are either paid or discounted; that a public auction, as threatened, or any other sale, would cause immediate and irreparable damage to the good will of the business, built and maintained by plaintiff throughout the years; and that unless an injunction issue forthwith, without notice and without bond, restraining and enjoining defendant, his attorneys, auctioneer or other agents from selling, encumbering, transferring, etc. any or all assets, stock and inventory of the partnership, including cash, accounts receivable, bonds, diamonds, valuable metals, tools and fixtures or other property, plaintiff would suffer irreparable harm and damage. Attached to the complaint was a notice of dissolution of the partnership, in letter form, dated February 21, 1958, written and mailed to plaintiff, wherein



defendant stated that he had elected to dissolve, "effective as of the close of business on February 28, 1958, our partnership . . . under the firm name of A. Jacobson & Son. I will thereafter proceed to wind up the partnership affairs and will account to you for your interest in said partnership. You are invited to participate or assist me in the winding up of those affairs. I will welcome your suggestions or any expression of your preferences to facilitate that task."

The sole question presented is whether the complaint justifies the issuance of a temporary injunction without bond or notice. Section 3 of the Injunctions Statute (Ill. Rev. Stat. 1957, ch. 69) provides: "No court or judge shall grant an injunction without previous notice of the time and place of the application having been given to the defendants to be affected thereby, or such of them as can conveniently be served, unless it appears, from the complaint or affidavit accompanying the same, that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without notice." Section 9 provides: ". . . before an injunction may issue, the plaintiff shall give bond in such penalty, upon such condition and with such security as may be required by the court or judge: Provided, bond need not be required when, for good cause shown, the court or judge is of opinion that the injunction ought to be granted without bond." Construing these sections, the courts of this State have consistently pointed out that injunctions are considered extraordinary remedies, and that temporary injunctions should not be granted without notice to the opposing party except upon specific and positive allegation of facts in the complaint or affidavit showing that notice would be so prejudicial as to

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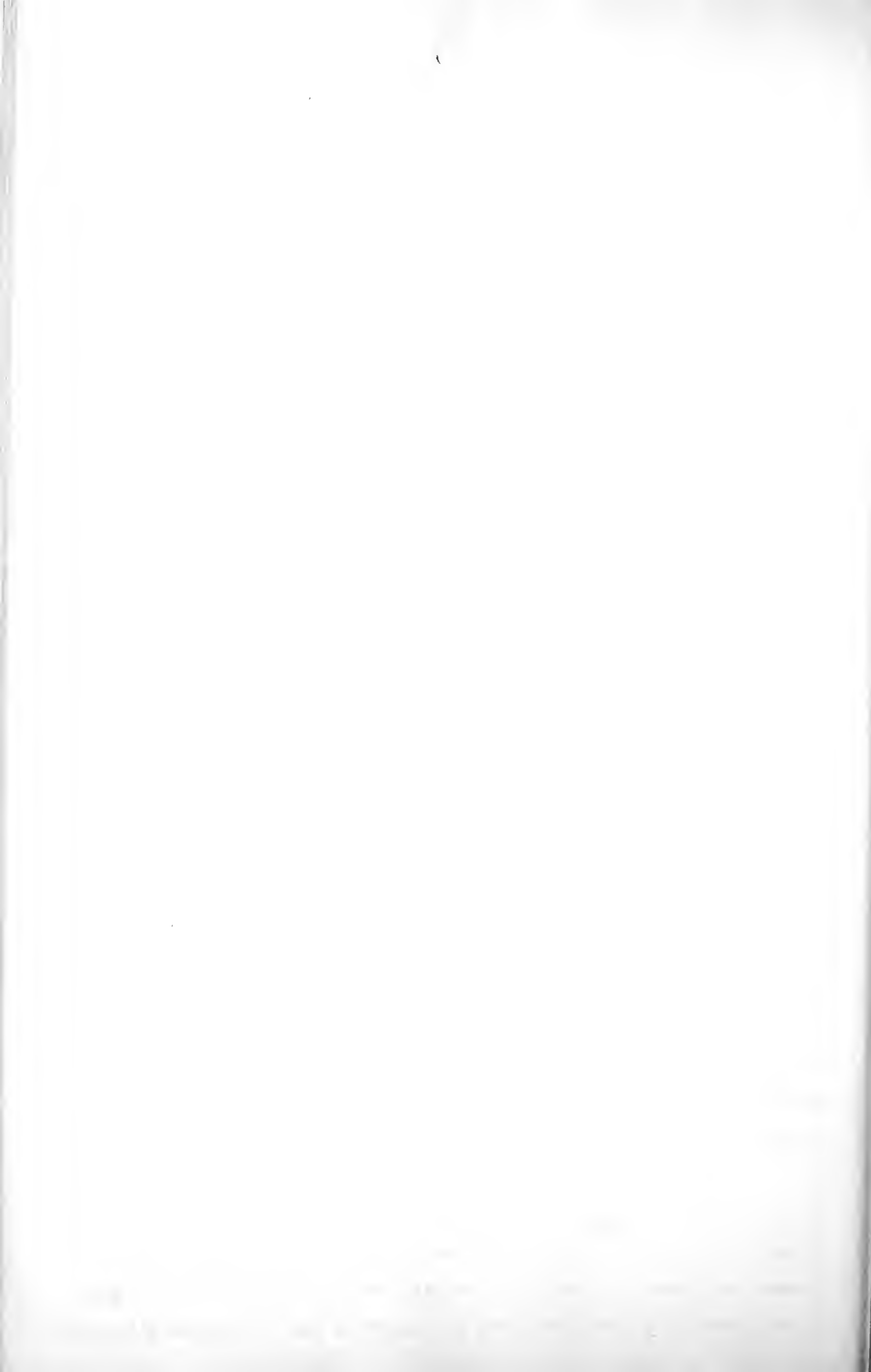
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cause irreparable harm or damage; and that where an injunction is issued without notice in a case where notice should have been given, the courts will reverse the injunction on that ground without regard to any other question. "This," said the court in the per curiam opinion of *Skarpinski v. Veterans of Foreign Wars*, 343 Ill. App. 271, "has been the law as laid down in decisions of this court for more than half a century." In *Crown Bldg. Corp. v. Monroe Amusement Corp.*, 326 Ill. App. 430, the observation of the court has particular relevancy to the circumstances of this case: "To obviate the necessity of giving notice a mere possibility that the giving of notice of the application for injunction might produce or enhance imaginary mischief is not sufficient." (Citing *Sprague v. Monarch Book Co.*, 105 Ill. App. 530.) In *Stenzel v. Yates*, 342 Ill. App. 435, the court said that "The extraordinary character of the injunctive remedy requires that it be awarded only where the complaint shows on its face a clear right to the relief. The facts relied upon to establish such right must be alleged positively and with certainty and precision, not mere opinions and conclusions. . . . If the complaint before us had met the requirements above set forth, we would still be obliged to reverse this particular case, because the injunction was issued without notice, although there were no averments that would dispense with the necessity of notice." Allegations that plaintiff will suffer irreparable injury and will be unduly prejudiced by giving notice were held to be mere conclusions, not justifying failure to give notice. *Washingtonian Home v. Chicago*, 281 Ill. 110; *Balaban & Katz Corp. v. Rose*, 283 Ill. App. 615; *Kessie v. Talcott*, 305 Ill. App. 627.

In the instant proceeding, neither the complaint nor affidavit makes any showing that defendant could not be conveniently or speedily served with plaintiff's application for injunction. Within an hour after the complaint was filed, the restraining order was entered, and the writ served on defendant at the partnership address. Obviously, plaintiff, had he desired to do so, could have served notice on defendant within less than an hour after he filed the complaint, and hearing on plaintiff's application for injunction could have been had without delay. The complaint alleges that defendant engaged an auctioneer to conduct a public auction on or before March 10, 1958. Plaintiff was afforded ample time before the auction to notify defendant of the application for a restraining order. Defendant's letter to his father, dated February 21, 1958, notified him of defendant's election to dissolve the partnership business, "effective as of the close of business on February 28, 1958." This gave plaintiff ample notice of any intended harmful action on the part of his son. It clearly appears from the record that there was ample time for the service of notice; neither do we find anything in the complaint or affidavit to justify the issuance of an injunction without bond. The recital in the order that "for good cause shown" the bond was excused does not comply with the statutory provision unless either the complaint or the affidavit contains proper allegations to support the order.

Plaintiff relies primarily upon **Mitchell v. Mitchell**, 10 Ill. App.2d 437. That case is clearly an exception to the rule. Plaintiff there had brought suit to recover certain realty and personalty from his wife who allegedly had committed acts of fraud, undue influence, and conversion in acquiring and in dealing with such



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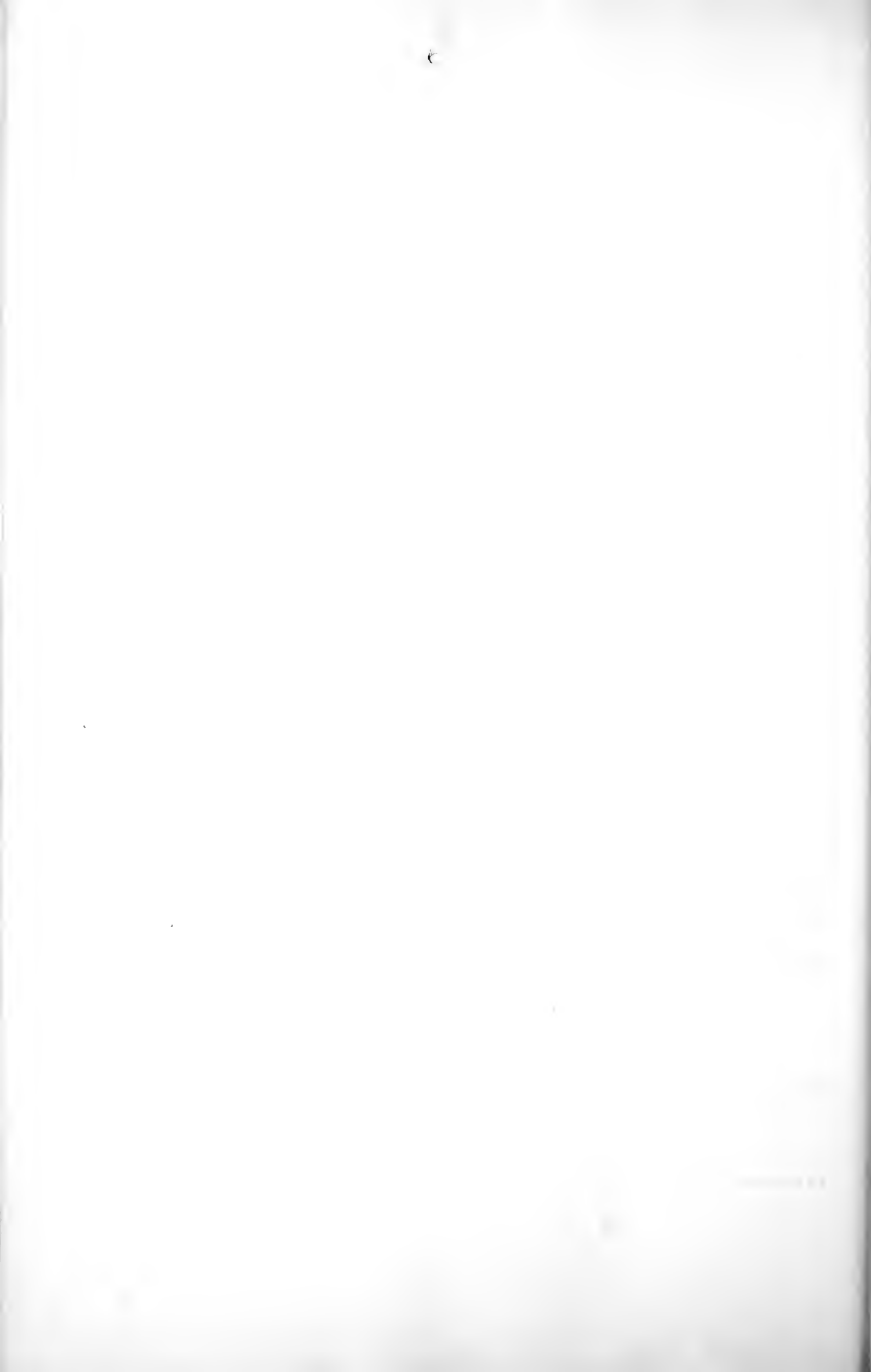
property, and had allegedly wrongfully withdrawn more than \$75,000.00 from a joint checking account opened to afford her easy access to funds for necessary family expenses during plaintiff's illness, had allegedly purchased realty in her own name with plaintiff's funds, and had caused transfer of stocks and life insurance policies to herself without consideration. The court held that the allegations of the verified complaint and petition justified issuance of a temporary injunction without notice and without bond because of the conduct of defendant who had virtually depleted the assets of plaintiff to the level where he was unable to furnish bond and could by the stroke of a pen cause further damage if notice were served.

For the reasons indicated we hold that under the circumstances of the case before us the injunction was wrongfully issued in the absence of notice and without requiring plaintiff to furnish bond, and that the trial court erred in denying defendant's motion to vacate and dissolve the injunction. Accordingly, the order is reversed, and the injunction dissolved.

Order reversed and injunction
dissolved.

Burke, P. J., and Bryant, J., concur.

Abstract only.



47372

RALPH E. MARRIOTT,

Appellant,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY,
a corporation,

Appellee.

181 A. 181

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a verdict of a jury and a judgment on that verdict finding the defendant not guilty. This action was brought to recover damages occasioned by the alleged breach by the defendant of the provisions of the Boiler Inspection Act (45 U. S. Code, Sec. 23), with the suit being instituted under the Federal Employers' Liability Act (45 U. S. Code, Secs. 51-59).

The plaintiff urges as error the giving by the court of Instruction No. 8, tendered by the defendant, and the alleged improper conduct of the defendant's counsel as he made his closing arguments to the jury.

The plaintiff's case is brought under Section 23 of the Federal Boiler Inspection Act. (45 U. S. Code.) That section provides as follows:

"It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to the life or limb...."



The application of the act has been construed in many cases, and in Urie v. Thompson, 337 U. S. 163, at page 188, the court said:

"Yet it has been held consistently that the Boiler Inspection Act Supplements the Federal Employers Liability Act by imposing on interstate railroads 'an absolute and continuing duty' to provide safe equipment. Lilly v. Grand Trunk R. Co., supra at 485; Southern R. Co. v. Lunsford, 297 U. S. 398, 401; cf. Baltimore & O. R. Co. v. Groeger, 266 U. S. 521, 528-529."

In Lilly v. Grand Trunk R. Co., 317 U. S. 481, the court considered the question of whether the cause of action under the Boiler Inspection Act was limited only to defects in construction or mechanical operation, and beginning on page 487 the court said:

"But there is no warrant in the language of the Act for construing it so narrowly, or for denying the Commission power to remedy shortcomings, other than purely mechanical defects, which may make operation unsafe. The act without limitation speaks of equipment 'in proper condition and safe to operate...without unnecessary peril to life or limb.' Conditions other than mechanical imperfections can plainly render equipment unsafe to operate without unnecessary peril to life or limb."

Instruction No. 8, which was given by the court at the suggestion of defendant and now objected to by the plaintiff, is as follows:

"The only issue in this case to be decided by you with respect to the liability of the defendant is whether or not the doorholder on Engine 5543 was or was not defective so that the said engine was rendered unfit for the service to which it was dedicated."

That instruction, of course, refers to a defect. It also refers to "rendering the engine unfit for the service to which it was dedicated" as a qualification of the defect. Standing



alone the instruction is in our opinion subject to criticism. We do not consider it to be artfully drawn or wisely given, and cannot give it our approval. However, the plaintiff tendered, and the court gave, other instructions which properly set forth the obligation of the defendant under the appropriate statute, particularly Instructions 5 and 7. It is our opinion that when these instructions are considered together, the jury was correctly advised in regard to the law of the case, and the giving of the objectionable instruction would not mislead the jury and the plaintiff has not been prejudiced by its irregularities. It is a well established rule that "It is sufficient when the instructions, considered as a whole, substantially present the law of the case fairly to the jury. That, we think, has been done in this case." Ritzman v. The People, 110 Ill. 362. That rule was followed in Henderson v. Shives, 10 Ill. App.2d 475, Hulke v. International Mfg. Co., 14 Ill. App.2d 5, at page 52, and Bunton v. Illinois Cent. R. Co., 15 Ill. App.2d 311, 329. When the instructions are considered as a whole, the giving of Instruction No. 8 did not prejudice the plaintiff, and was a harmless error.

The second error of which the plaintiff complains is, that in the final argument the attorney for the defendant read certain questions and answers from a stenographic report of the interrogation of the plaintiff by certain of defendant's representatives shortly after the accident had taken place. The stenographic report had not been admitted into evidence, as such, on the basis that it was not impeaching. It was mainly,



if not entirely, corroborative of the statement that the plaintiff had given on direct examination on the witness stand in the trial of the case. But on the cross-examination the statement had been used and questions had been asked and answers given covering the same material read and referred to in the closing arguments. It had been urged upon the court that they were admissions against interest made by the plaintiff. It has been urged in the argument by plaintiff's counsel here that the mere presence in the hands of the defendant's attorney of that stenographic statement, and its use in the closing argument, gave it such an appearance of verity that it was prejudicial to the plaintiff's trial and unduly emphasized the cross-examination of the plaintiff involving this same statement. We do not believe that the conduct of the defendant's counsel was entirely circumspect. Neither do we believe that his conduct was prejudicial in the sense that it deprived the plaintiff of a fair and impartial trial or prejudiced the jury in regard to its decision. We have read and considered the cases cited by the plaintiff: those of Heide v. Schubert, 166 Ill. App. 586, Paliokaitis v. Checker Taxi Co., 324 Ill. App. 21, and the full opinion in the case of Kretzmann v. American Development Company, abstracted in 288 Ill. App. at page 623. Each of these cases is clearly distinguishable on the facts from the instant case, and in our opinion the difference in the various factual situations determines whether the conduct of the defendant's attorney is prejudicial or not. We do not think it was here.

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We hold that this record indicates that the plaintiff had a fair and impartial trial, free from any substantial error. The judgment of the trial court is affirmed.

AFFIRMED.

BURKE, P. J., and FRIEND, J., CONCUR.

ABSTRACT ONLY.

15
47329

CENTRAL WATCH SERVICE,

Appellee,

v.

GOOSE ISLAND WAREHOUSE,
INC., et al.,

On appeal of GOOSE ISLAND
WAREHOUSE, INC.,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

18 I.A. 2d 132

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant Goose Island Warehouse, Inc. from a judgment for \$1,367.74 against it in an action upon an alleged account stated by plaintiff, Central Watch Service. Originally there were two other defendants, Metron, Inc. and Metron Shipping Corporation. Metron Shipping Corporation was dismissed from the action before trial upon motion of plaintiff. The case was tried before a jury and resulted in a directed verdict in favor of Metron, Inc. and a verdict against defendant Goose Island Warehouse, Inc. for the full amount of plaintiff's claim minus \$7.04.

Defendant contends for reversal that plaintiff is not an entity entitled to maintain this action and, further, that plaintiff has failed to prove an account stated. We shall consider both contentions.

As to the first contention, the record reveals that plaintiff, although incorporated under the laws of this State in 1915, has been conducted as a partnership since 1945. The corporate existence has, however, been maintained by compliance with all provisions of the Business Corporation



Act relating to the filing of annual reports and the payment of franchise taxes. In May, 1945, an assumed name certificate was filed with the Clerk of the County Court of Cook County to certify that the true and real full names of all persons owning and conducting the business known as Central Watch Service were Ethel S. Glazen, Dorothy S. Wright, Edward K. Stackler, Sidney Stackler, and Edward and Sidney Stackler as trustees for Leon, Rose and Diana Stackler. However, defendant did not raise any objection to plaintiff's right to maintain the action under the name of Central Watch Service until after a trial on the merits when it filed a motion to vacate the judgment. It has been held that such a judgment is not void but merely irregular, and we are of the opinion that defendant may not now attack the judgment for a technical inaccuracy which if properly raised before trial would have resulted merely in a redesignation of the party or parties plaintiff. See Collateral Finance Co. v. Braud, 298 Ill. App. 130, 143, 144 (1938).

As to defendant's second contention that plaintiff did not prove an account stated, the record reveals that defendant operates a warehouse, situated in Chicago, abutting the north branch of the Chicago River. In June, 1955, Metron Shipping Corporation and defendant entered into an agreement whereby defendant would unload and store the cargo of an ocean-going vessel inbound from Europe which was to proceed up the Chicago River and dock at the warehouse. The agreement also provided that defendant was to reload the vessel with an outbound cargo. The building and land used by defendant was inadequate for



-3-

unloading the contents of the vessel. Defendant made arrangements to use for this purpose land contiguous to that of the warehouse. To protect the cargo the services of plaintiff were engaged. The watchmen supplied by plaintiff reported to the job on June 24, 1955. On June 29 plaintiff sent defendant a bill for services for June 24 through June 30, in the amount of \$279.58. Defendant returned the bill immediately with a notation that it should be sent to the Metron Shipping Corporation. Plaintiff forwarded the bill as instructed and the watch service continued until July 16, 1955, when, the watchmen were removed.

On July 3, 1955, plaintiff had sent defendant a bill in the amount of \$2,108.48, which covered in advance services for the entire month of July. In the latter part of July, plaintiff's representative called upon Metron Shipping Corporation, asked for payment, and was advised that "the bill" had been sent to the company's eastern office and had not yet been approved. Two or three weeks later, plaintiff's representative again called at the office of Metron Shipping Corporation and was informed that there was not enough money in the Chicago office to pay the bill. At the trial the same representative of plaintiff testified as follows:

"Inasmuch as Metron's name was given us as the people who were going to pay the bill, I called on them."

On August 19, 1955, plaintiff sent a bill to Metron Shipping Corporation, at its office at 209 South La Salle Street, in Chicago. The amount of the bill was \$1,088.16 for services rendered from July 1 through July 16. This bill was marked

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"copy of final corrected bill." On September 20, 1955, plaintiff sent Metron Shipping Corporation the following invoice form:

For: Goose Island Warehouse

Invoice Date

June 29, 1955—

Watchman Service for June 24-30 279.58

August 19, 1955—

Watchman Service for July 1-16 1088.16

July 11, 1955—

Watchman Service for July 1 7.04
\$1374.78

Plaintiff made no request from Goose Island after the first bill was returned. None of the bills were paid. On October 19, 1955, plaintiff filed this action in the Municipal Court of Chicago alleging an account stated.

Recently this court has had occasion to set forth in plain language the definition and requirements of an account stated.

In Canadian Ace Brewing Co. v. Swiftsure Beer Service Co.,

17 Ill. App.2d 54, we said:

"[A]n account stated is an agreement between two parties which constitutes a new and binding determination of the balance due on indebtedness arising out of previous transactions of a monetary character, containing a promise, express or implied, that the debtor shall pay the full amount of the agreed balance to the creditor. The State v. Illinois Central R.R. Co., 246 Ill. 188, 241 (1910); Chase v. Bramhall, 343 Ill. App. 171 (1951); Pure Torpedo Corp. v. Nation, 327 Ill. App. 28 (1945); Dean and Son v. W. B. Conkey Co., 180 Ill. App. 162 (1913). The agreement, must, of course, manifest the mutual assent of both the debtor and the creditor, although such assent may be inferred from the retention by one of the parties of a statement of account, rendered by the other, for an unreasonable time and without objection. Pure Torpedo Corp. v. Nation, supra; Dean and Son v. W. B. Conkey Co., supra; 6 Williston on Contracts, sections 1863, 1864; Restatement of Contracts, vol. 2, sec. 422."

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We can find no evidence of the requisite mutuality in the instant case necessary to establish an account stated. The trial court should have allowed defendant's motion for directed verdict at the close of all the evidence, or its motion for judgment notwithstanding verdict.

Judgment reversed.

Schwartz, P. J., and McCormick, J., concur.

Abstract only.



21

A

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

181A^{2d} 183

Appellant.

This is an appeal from a judgment for \$5000 in favor of Michael McManigal and a judgment for \$116 in favor of Cecil McManigal, his mother. The complaint charges breach of duty by the common carrier and assault and false imprisonment accompanied by an attempt on the part of defendant's bus driver to force plaintiff Michael McManigal to participate in and subject himself to lewd, indecent, immoral and unnatural acts. The liability is admitted. The only serious question is whether the damages are excessive.

Plaintiff, a boy of nine at the time of the occurrence, January 22, 1951, was the only passenger on defendant's bus. As the bus approached his destination, he proceeded to the front door. He noticed as he did so that the driver was "fumbling" with the front of his pants. When the bus came to a stop the door did not open. The boy turned around and saw that the driver had exposed his person. The driver called to the boy and asked him to touch his person. The boy said no and started toward the rear of the bus

where there was another door, and as he was almost past the driver, the driver reached out, grabbed his arm and pulled him over, saying, "Oh, come on." But the boy pulled away, ran to the back of the bus, and stepped down on the treadle that ordinarily would open the door. The driver having the bus in gear and the motor running fast, the door did not open. The boy jumped up and down on the treadle, screaming "Let me out, let me out." The driver laughed but the door opened and the boy ran out.

The boy reported the facts to his mother and to others. After the incident he suffered from sleeplessness and was "a little bit nervous," attributing it to the "court and policemen and what not," but physically he felt all right. After three or four days the mother called a doctor. The organic findings were negative. The doctor saw the boy ten or twelve times between January and June 1951. About a month after the incident the boy developed a fever which ran on and off for a period of four or five months. The doctor testified, "I never specifically associated that with the incident." He further testified that a shock or what he described as "a disturbance in the central nervous system" had its effect upon the body generally and could give rise to general ill health. From this it could be inferred that the fever might have been due to the shock. Other items were fears and apprehensions which developed in the boy and, to quote plaintiffs' attorney, "his mental state, his nervousness or reactions...lasted a year

-3-

and then began to diminish, though at the end of that time he was still listless." The doctor's fee was \$116.

It is firmly established that a common carrier is obligated to protect passengers from indecent approach, assault and insult. Chicago & Eastern R.R. Co. v. Flexman, 103 Ill. 546 (1882); Chicago Traction Co. v. Mahoney, 230 Ill. 562 (1907); McMahon v. Chicago City Ry. Co., 143 Ill. App. 608 (1908) (aff'd 239 Ill. 334 (1909)); Blackwell v. Fernandez, 324 Ill. App. 597 (1945); Coggins v. C. & A. R.R. Co., 18 Ill. App. 620 (1886). The question is whether or not the carrier is liable also for exemplary damages because clearly on the basis of proximate damages, the amount of the verdict is excessive. The trial judge refused to give an instruction directing the jury to allow exemplary damages, but apparently they were moved by the shocking character of the indecent exposure and allowed such exemplary damages anyway. The mere fact that the trial court failed to so instruct the jury does not make the verdict including such damages erroneous. Shemaitis v. Collins, 348 Ill. App. 549 (1952). In that case the individual against whom judgment was rendered had committed the act, and the case throws no light on the liability of a principal for exemplary damages for the act of an agent.

Plaintiffs' theory seems to be that since a corporation can act only through agents, what was done by the bus driver was done by the defendant, and if the agent was liable for exemplary damages, then the defendant was liable. An examination of the

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Illinois cases in which exemplary damages were allowed against a principal reveals that they were all cases in which the act of the agent was an act done in pursuance of the principal's business. Singer Mfg. Co. v. Holdfodt, 86 Ill. 455 (1877); Chicago Title & Trust Co. v. Core, 223 Ill. 58, 65 (1906); Chicago Traction Co. v. Mahoney, 230 Ill. 562, 567 (1907); Taneski v. St. Louis M.B.T. Ry. Co., 230 Ill. App. 300, 304 (1923); Busick v. I.C. R.R. Co., 201 Ill. App. 63 (1915). In Singer Mfg. Co. v. Holdfodt, supra, the agent who committed the wrongful act did so with force and violence while attempting to repossess a sewing machine sold to the plaintiff, for which the plaintiff had fully paid. The court held that exemplary damages were allowable. In Chicago Title & Trust Co. v. Core, supra, the agent of the defendant, without legal authority and in discharge of the business of the defendant, trespassed upon and seized goods and property belonging to the plaintiff. The court held that exemplary damages were allowable. In Chicago Traction Co. v. Mahoney, supra, the court directed the jury to allow exemplary damages in a case where a conductor evicted a passenger for refusal to pay the fare and in so doing used excessive force, as a result of which the passenger sustained physical injuries. The amount of the award was \$1250. In Taneski v. St. Louis M.B.T. Ry. Co., supra, the plaintiff charged that while walking along a wagon road (which apparently was on railroad property) the railroad's watchman came up behind him, struck him on the head with a club or

billy, knocked him down, struck him several times and cursed and beat him while he was down. The watchman had been commissioned as a special police officer in order that he might make arrests. The trial court instructed the jury that they could allow such damages in addition to actual damages "as smart money or punishment." Judgment for \$1250 was sustained. In Busick v. I.C. R.R. Co., supra, the plaintiff was assaulted by a special officer or agent of the defendant who claimed that the plaintiff was trespassing. In the assault the plaintiff's arm was broken at the elbow. The court instructed the jury to allow exemplary damages, and a verdict for \$1250 was returned. The court, citing Chicago Traction Co. v. Mahoney, supra, held that exemplary damages were allowable in such a case, but reversed and remanded the cause on account of error in the instructions.

From the foregoing cases we conclude that where it is sought to charge a principal for the act of an agent, exemplary damages can only be assessed where the act complained of is one committed by the agent while ostensibly discharging duties within the scope of the corporate purposes, and that this applies to a common carrier. Indecent exposure by the bus driver was not such an act. It cannot be doubted that exemplary damages were allotted because of the revolting character of the indecent exposure, and to that extent the judgment should be remitted.

It is always difficult to determine the amount of such a remittitur. One of the fundamental purposes of justice is equality. Juries do not know and have no idea what has been

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allowed in similar cases. In the precedents cited there are three cases where far more serious physical harm was done and exemplary damages allowed and the verdicts were only \$1250. It can well be said that these were long before the great rise in the cost of living. Making all due allowances for that and comparing the character of the assault and false imprisonment in the instant case with that in other cases, \$5000 still is far too high. We believe that a judgment for \$3500 is the maximum that can be allowed. It would be folly to have the case tried again, from the point of view of both the minor and the defendant. We have therefore concluded to make affirmance of the judgment conditioned upon a remittitur of \$1500 being entered.

Defendant makes some other points, only one of which deserves discussion. In propounding a hypothetical question, plaintiffs' counsel used the real name of the plaintiff Michael, instead of referring to him as a hypothetical person. This was wrong, but the error was corrected by the court's permitting counsel to substitute "hypothetical child" for the name "Michael."

The judgment in favor of Cecil McManigal for \$116 is affirmed. The judgment in favor of Michael McManigal will be affirmed if, within 10 days from the entry of this order, Michael McManigal will file a remittitur in the office of the clerk of this court in the amount of \$1500, thereby reducing the judgment to \$3500; otherwise, judgment will be reversed

the judgment to \$2500; with costs, interest and
costs of this case to and for the
Michael, the wife of
affirmed by the
affirmed by the

-7-

and the cause remanded for new trial. Costs will be charged to defendant.

Judgment in favor of Cecil McManigal
affirmed.

Judgment in favor of Michael McManigal
will be affirmed upon filing of
remittitur.

Abstract only.



47484

860 LAKE SHORE DRIVE TRUST, etc.,
et al.,

Appellees,

v.

LUCIEN WICKHAM and MRS. DOROTHY
WICKHAM,

Appellants.

18 I.A.²¹ 184

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

PER CURIAM:

The plaintiffs, 860 Lake Shore Drive Trust, etc. et al., brought an action in forcible entry and detainer in the Municipal Court of Chicago, which was tried with a jury. The jury on the direction of the court returned a verdict for the plaintiffs on November 1, 1957. On January 20, 1958 the defendants' motion for a new trial was denied and the appeal bond was set at \$100. On January 24, 1958 defendants Lucien Wickham and Mrs. Dorothy Wickham filed a notice of appeal from that judgment. No appeal bond was then filed, nor has any bond been filed since. The plaintiffs, appellees here, have made a motion to dismiss the appeal.

Section 18 of the Forcible Entry and Detainer Act (Ill. Rev. Stat. 1957, chap. 57, par. 19) provides:

"If any party shall feel aggrieved by the verdict of the jury or decision of the court, upon any trial had under this Act, such party may have an appeal, to be taken to the same courts, in the same manner, and tried in the same way as appeals are taken and tried in other cases. Provided such party files notice of appeal and bond within five (5) days from the rendition of the judgment * * *."

Section 11 of the Act provides: "The provisions of the Civil Practice Act * * * shall apply to all proceedings hereunder

no brief filed: per clerk of App. court.
Wm. H. Murphy for appellants.
Sedberg, Deval, L. H. Dur, and Mikva, for appellees.

in courts of record, except as otherwise provided in this Act." Under the statute appeals in actions brought under the Forcible Entry and Detainer Act are governed by that Act. The Act provides that the party must file notice of appeal and bond within five days from the rendition of the judgment.

In Veach v. Hendricks, 278 Ill. App. 376, it was held that filing of a notice of appeal is jurisdictional. Under the Forcible Entry and Detainer Act in order to confer jurisdiction upon this court it was necessary for the appellants to file both a notice of appeal and a bond within five days from the date of the rendition of the judgment, and without the filing of both a notice of appeal and bond within apt time no appeal has been perfected. Karavidas v. O'Dwyer, 333 Ill. App. 154. In Kruse v. Ballsmith, 332 Ill. App. 301, the court says:

"Section 19 of the Forcible Entry and Detainer Act prescribes the mode for perfecting appeals under this remedy, and provides that the appeal bond and notice of an appeal from a judgment of the circuit court must be filed within five days from the rendition of judgment under the Forcible Entry and Detainer Act. These requirements have been deemed to be controlling and jurisdictional, and appeals perfected after the five days have been dismissed, notwithstanding the fact that they were taken within the time authorized by the Civil Practice Act." [Citing cases.]

The defendants contend that the plaintiffs have waived the question of jurisdiction by filing a general appearance and resisting the defendants' motion to extend time to file a complete record. An order was entered by this court extending the time to file the complete record to May 15, 1958. Where a reviewing court has not acquired jurisdiction of a case,

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that jurisdiction cannot be conferred by consent or acquiescence. Wishard v. School Directors, 279 Ill. App. 333. To so hold would defeat the purpose of the forcible entry and detainer statute, which was to create a summary remedy in which the rights of the parties would be speedily determined and an appeal permitted only if taken within the time specified in the statute. Prasnikar v. Harmeling, 329 Ill. App. 341.

The appeal is dismissed.

Appeal dismissed.

Abstract only.



329

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18 I.A.^{2d} 185

47316

RICHARD J. DALEY, Mayor, Local Liquor
Control Commissioner,

Plaintiff - Appellant,

v.

LICENSE APPEAL COMMISSION, A. L. CRONIN,
Chairman, NORMANDY LOUNGE & RESTAURANT,
INC., Licensee,

Defendants - Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action by the Mayor of Chicago under the Administrative Review Act (Ill. Rev. Stat., Chap. 110, Par. 264 et seq.) to review an order of the License Appeal Commission under section 153 of the Dram Shop Act (Ill. Rev. Stat., Chap. 43, Par. 153) setting aside the Mayor's order revoking the liquor license of the Normandy Lounge by virtue of his authority as Local Liquor Control Commissioner of Chicago. (Ill. Rev. Stat., Chap. 43, Par. 111). The order of the Commission was affirmed and the Mayor has appealed.

The Mayor's complaint in the Superior Court alleged the revocation of the license because "agents of the licensee permitted female persons on the licensed premises to solicit patrons thereof to purchase alcoholic and non-alcoholic liquor"; that "female persons committed lewd and indecent acts" in the lounge; and that female persons in the lounge "solicited police officers...to engage in immoral acts." It alleged the reversal of the revocation order by the Commission and the denial of a rehearing.

-2-

The question is whether the trial court properly decided that the Commission correctly set aside the Mayor's revocation of the license of the Normandy Lounge.

There was evidence that the police officers saw a woman approach a man at the lounge bar "and immediately a drink and a shot glass of colored liquid was served to her"; that she had "five of those shot glasses, one after another without asking by name or asking the bartender for a drink"; that each time the man "would pay the bartender" and the woman "would take the change and push it to the bartender, who would place it in a cup...under the bar"; and that the woman was the one who had addressed the policeman during his visit on the previous night and introduced herself. There was evidence also that a "semi-strip" dancer asked one of the officers to buy her a drink and led him by the hand to a booth where six or eight rounds of drinks were served to this, and another, couple by a waitress who acted upon the order of the women, "make mine the usual"; that all the while the couples were in the booth the same waitress served them and stood close by within earshot; that one of the women asked one of the officers to buy champagne; and that the officers were in the lounge on this occasion for about three hours.

We think that from this evidence the Mayor could reasonably infer that the bartender and waitress, employees of the lounge, permitted the "females to solicit" the policemen to purchase "alcoholic or non-alcoholic liquor"; and that this was a proper exercise of the Mayor's discretion.

It is admitted that the Mayor has the power to use his discretion reasonably in revoking licenses; that in his exercise of that discretion he may determine whether a licensee has violated a city ordinance; that there is a city ordinance prohibiting a licensee or its agents from permitting female solicitation of purchase of drinks; that the waitress and bartender are lounge employees; and that an issue here is whether the lounge or its agents permitted a female person, in the lounge, to solicit a patron to purchase drinks. The Commission had no evidence before it which contradicted that of the police officers. The order setting aside the revocation was against the uncontradicted evidence upon which the Mayor acted.

We need not consider whether section 153 of the Dram Shop Act as it was in 1953 or as amended in 1955 applies to the instant case. If the de novo proceeding before the Commission was confined to the question of the propriety of the Mayor's action, a finding that the Mayor abused his discretion would be error as a matter of law. If the de novo proceeding was not so limited a finding that there was not a violation of the city ordinance would be error as a matter of law.

The trial judge on review ought to have reversed the order of the Commission and it was error to affirm the Commission's order. The judgment of the Superior Court and the order of the License Appeal Commission are reversed, and the order of the Local Liquor Control Commissioner is affirmed.

REVERSED.

LEWE AND MURPHY, JJ., CONCUR.

ABSTRACT ONLY.

181.A.^{2d} 224

Agenda No. 16

DEFENDANT APPELLEE.

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time employment. The extent to which fees had been shared in other cases was disputed. At the start of their association, the defendant had a case, Bradshaw v. City of East St. Louis, upon which suit had been filed. During their association, this case was tried and resulted in a \$40,00.00 judgment which was sustained on appeal. In the course of efforts to prove and disprove an agreement to share the attorney's fee in the Bradshaw case, each party attempted to corroborate his position by showing that he had carried the burden of work in the case. The irreconcilable versions of the parties which resulted would normally not detain us for the lower court should be accorded the fullest latitude in resolving the factual issues.

However, plaintiff has raised an issue of fabrication of evidence in the introduction of certain exhibits by defendant. We have examined the originals in the record of Defendant's Exhibit 3 and Plaintiff's Exhibit 7, each purporting to be an exact copy of an original letter sent to the trial judge following argument of the post trial motion. Plaintiff's Exhibit 7 was produced from the files of the City of East St. Louis, the defendant in the Bradshaw case; Defendant's Exhibit 3 came from defendant's file of the same case. These carbon copies were typed on different typewriters and bore plaintiff's name as the writer in Plaintiff's Exhibit 7 and the defendant's name as the writer in Defendant's Exhibit 3. Obviously, one of these exhibits is false and its production a fraud upon the Court. Also, Defendant's Exhibit 2, purporting to be

a duplicate of the original manuscript of the appellate brief in the Bradshaw case is challenged as a fabrication and various discrepancies between the printed brief and such manuscript are pointed out. The issue of fabrication of an exhibit was again raised in plaintiff's post trial motion in connection with Defendant's Exhibit 4 which purports to be a copy of an agreement submitted to defendant by plaintiff at the time of the termination of their association. Plaintiff's proffered copy of such agreement, made a part of his motion for a new trial, differed very substantially from Defendant's Exhibit 4. In connection with Defendant's Exhibit 2, an objection was sustained to plaintiff's offer into evidence of the brief in the Bradshaw case which defendant testified he alone prepared, together with another appellate brief admittedly written by defendant. It is argued by plaintiff that a comparison of the style of writing, use of words and organization of the two briefs is relevant in view of the defendant's testimony that he alone prepared the appellate brief and that Defendant's Exhibit 2 is a carbon copy of the manuscript of such brief.

The cumulative effect of such evidence is such that the issue of fabrication of exhibits may dominate and control the case. *Sharon v. Terry, et al*, 36 Fed. 337; *Chicago City Ry. Co. v. McMahon*, 103 Ill. 485, 487; *In Re Estate of Sandusky*, 321 Ill. App. 1, 18, 52 NE 2d 285, 292. Because the parties involved are officers of the Court, we feel the greatest latitude should have been permitted in

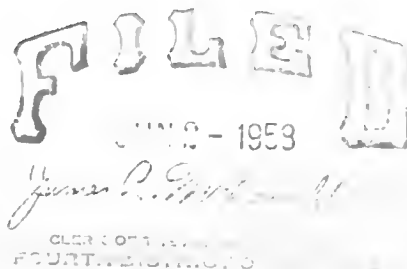
the presentation of evidence bearing on the charge of fabrication and the assertion carefully considered by the trial court. For this reason it was error to deny admission of exhibits offered by plaintiff. Neither the attorneys for the parties nor the trial judge could give this issue the attention it demanded since it was first raised in the course of trial. Had there been opportunity to prepare for such issue, either side might have found secondary evidence which would have convincingly supported their view.

We therefore conclude that the case must be reversed and remanded to the trial court for a new trial.

Reversed and remanded.

Culbertson, J., and Scheinman, J., concur

Publish Abstract Only



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Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

191A^{2d} 273

General No. 10093

Agenda No. 16

Mary E. Hering,

Plaintiff-appellee,

vs.

Garlin Hilton,

Defendant-Appellant.

appeal from the
Circuit Court of
McDonough County.

REYNOLDS, J.

The Appellate Court (13 Ill. App. 2d 132) reversed a judgment of the circuit court of McDonough County, entered on a jury verdict allowing plaintiff \$7,000 as damages for personal injuries sustained in a collision between plaintiff's automobile and the truck driven by the defendant, Garlin Hilton. The Supreme Court allowed plaintiff, Mary E. Hering, leave to appeal from the judgment of the Appellate Court, and the Supreme Court, in Hering v. Hilton, 12 Ill. 2d 559, reversed the judgment of the Appellate Court, and remanded the cause to the Appellate Court with directions to reconsider the wilful and wanton issue in the cause, in the light of the analysis of the Supreme Court, and to pass upon the remaining questions in the cause.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10000

General No. 10000

Spokane County, Washington,
Superior Court of
Spokane County.

Mary E. Horton,
Plaintiff-Appellee,
vs.
Garlin Hilton,
Defendant-Appellant.

REVEREND, J.

The Appellate Court (1st Ill. Dist.) reversed
judgment of the circuit court of Spokane County, and set
on a jury verdict allowing plaintiff \$7,000 as damages for
personal injuries sustained in a collision between plaintiff's
automobile and the truck driven by the defendant, Garlin
Hilton. The Supreme Court allowed plaintiff, Mary E. Horton,
leave to appeal from the judgment of the circuit court, and
the Supreme Court, in Horton v. Hilton, 1 Ill. 2d 316, 160 N.E.2d 100,
the judgment of the Appellate Court, and reversed the same
to the Appellate Court with directions to reconsider the case
and warrant issue in the case, in the light of the holdings of
the Supreme Court, and to pass upon the remaining questions
in the case.

This court in consonance with the decision of the Supreme Court on the question of wilful and wanton misconduct on the part of the defendant, must now hold that the verdict of the jury and the judgment entered on such verdict, finding the defendant guilty of wilful and wanton misconduct as charged in Count II of the complaint, is sustained by the evidence and that no error was committed by the trial court in overruling the motion for a directed verdict as to said Count II, and permitting the cause to go to the jury.

The appeal to this court raised three points. First, the trial court should have stricken Count II of the plaintiff's amendment to the amended complaint; Second, the trial court erred in allowing the issues of Count II, wilful and wanton misconduct, to be determined by the jury; and Third, that the trial court erred in giving plaintiff's instructions 6, 19 and 20. The decision of the Supreme Court disposes of points one and two. This court in its opinion, Hering v. Hilton, 13 Ill. App. 2d 132, discussed the third point, that of the instructions, holding that "an examination of all the instructions given show that the jury was properly instructed and we find no reversible error in the instructions."

After the appeal was perfected and before the Appellate Court, a further question arose, namely, could the plaintiff, after the appeal by the defendant, claim the right to assign error on the part of the trial judge in sustaining the motion for a directed verdict as to Count I of the complaint, and

This court in consonance with the decision of the Supreme Court on the question of willful and wanton misconduct on the part of the defendant, must now hold that the verdict of the jury and the judgment entered on such verdict, finding the defendant guilty of willful and wanton misconduct as charged in Count II of the complaint, is sustained by the evidence and that no error was committed by the trial court in overruling the motion for a directed verdict as to said Count II, and permitting the cause to go to the jury.

The appeal to this court raises three points, first, the trial court should have stricken Count II of the plaintiff's amendment to the amended complaint; second, the trial court erred in allowing the issues of Count II, willful and wanton misconduct, to be determined by the jury; and third, that the trial court erred in giving plaintiff's instructions 6, 12 and 20. The decision of the Supreme Court disposes of points one and two. This court in its opinion, Hering v. Milton, 12 Ill. App. 2d 101, discussed the third point, that of the instructions, holding that "on examination of all the instructions given show that the jury was properly instructed and we find no reversible error in the instructions."

After the appeal was perfected and before the appellate court, a further question arose, namely, could the plaintiff, after the appeal by the defendant, claim the right to assign error on the part of the trial judge in sustaining the motion for a directed verdict as to Count I of the complaint, and

ask for affirmative relief as to that matter without cross appeal. This court held that the appeal is limited to the judgment appealed from, namely the judgment against the defendant for wilful and wanton misconduct, and that in the absence of a cross appeal by the plaintiff, the question of the ruling of the trial court as to Count I was not before this court. This was upheld by the Supreme Court at page 566 of its opinion.

Since all questions raised by the appeal have been decided, the judgment of the Circuit Court of McDonough County is affirmed.

Affirmed.

Carroll, J., concurs

Roeth, P. J., took no part in the consideration of the case.

ask for affirmative relief as to that matter without cross appeal. This court held that the appeal is limited to the

Judgment appealed from, namely the judgment against the defendant for willful and wanton misconduct, and that in the absence of a cross appeal by the plaintiff, the question of the ruling of the trial court as to Count 1 was not before this court. This was upheld by the Supreme Court at page 566 of its opinion.

Since all questions raised by the appeal have been decided, the judgment of the Circuit Court of Montgomery County is affirmed.

Affirmed.

Carroll, J., concurs.

Reith, J., took no part in the consideration of the case.

Abstract

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STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10166

Agenda No. 3

118 I.A. 355

Hazel V. MacKinlay,

Plaintiff-Appellant,

vs.

Appeal from the
Circuit Court of
Sangamon County.

Donald D. MacKinlay,

Defendant-Appellee.

REYNOLDS, J.

This cause comes to this court on appeal from an order and decree of the Circuit Court of Sangamon County, modifying a decree for divorce entered on the 30th day of March, 1953, in said court. By the terms of the original decree, the defendant was ordered and decreed to pay to the plaintiff the sum of \$100 per month for support and maintenance of minor children, the sum of \$50 per month as alimony for the plaintiff, and to turn over and assign to the plaintiff certain retirement pay funds, leave pay funds, and certain rights in real estate under a contract for deed.

On October 5, 1954, plaintiff filed her petition to show cause why defendant should not be held in contempt of court for failure to pay in accordance with the decree.

Alaska

10/10

STATE OF ALASKA
SUPERIOR COURT
JUDICIAL DISTRICT

General No. 10166

Hazel V. Mackinlay,

Plaintiff-opposite,

vs.

Donald D. Mackinlay,

Defendant-opposite.

REPLY, J.

This case comes to this court on appeal from a decree and decree of the Circuit Court of Eastern Alaska, made by a decree for divorce entered on the 28th day of June, 1953, in said court. By the terms of the original decree, the defendant was ordered and decreed to pay to the plaintiff the sum of \$100 per month for support and maintenance of minor children, the sum of \$50 per month as alimony for the plaintiff, and to turn over and assign to the plaintiff certain retirement pay funds, leave pay funds, or certain rights in real estate under a contract in deed. On October 5, 1954, plaintiff filed her petition to show cause why defendant should not be held in contempt of court for failure to pay the aforesaid sums.

On May 31, 1955, the defendant having paid in full according to the decree, the Court modified the decree by reducing the support and maintenance provision from \$100 to \$85 as one of the children had become of age and married. The alimony provision was not changed or modified. On April 12, 1957, the defendant filed his petition for modification of the divorce decree, as modified, asking that the alimony allowance of the original decree be discontinued, alleging that there had been a change in the circumstances of the parties since the entry of the original decree, and as modified; that the defendant had had financial reverses, had remarried and had additional obligations resulting therefrom; that the plaintiff was employed earning upwards of \$200 per month and had become through the death of her father owner of a one third interest in a 400 acre income producing farm, so that the income of the plaintiff equaled or exceeded that of the defendant.

The same chancellor who granted the divorce and entered the original decree, and who had modified the decree on May 31, 1955, held the hearing on the petition to discontinue the alimony payments and on the 4th day of September, 1957, granted the prayer of the petition and ordered the alimony payments discontinued. From that decree of September 4th, 1957, the plaintiff appeals to this court.

Since the only question before this court is that of the alimony payments, the decree modifying the decree as to support and maintenance payments will not be considered, since

On May 31, 1955, the defendant having paid in full according to the decree, the Court modified the decree by reducing the support and maintenance provision from \$100 to \$50 on one of the children had become of age and married. The alimony provision was not changed or modified. On April 12, 1957, the defendant filed his petition for modification of the divorce decree, as modified, asking that the alimony and maintenance of the original decree be discontinued, alleging that there had been a change in the circumstances of the parties since the entry of the original decree, and he testified that the defendant had had financial reverses, had remained unemployed and had additional obligations resulting from the death of his father. He was employed earning upwards of \$200 per month and had houses through the death of her father owner of a third interest in a 400 acre income producing farm, so that the income of the plaintiff ceased or was reduced from the date of the divorce. The same chancellor who granted the divorce in 1955, the original decree, and who had modified the decree on May 31, 1955, held the hearing on the petition for modification of the alimony payments and on the 15th day of September, 1957, granted the prayer of the petition and ordered that the alimony payments be discontinued. The Court stated in its opinion that, 1957, the plaintiff appeals to this court. Since the only question raised in this case is one of the alimony payments, the decree modifying the decree as to support and maintenance payments will not be so altered, since

that only related to the reduction of the amount of money to be paid for the support of the children. That decree, entered on May 31, 1955, can have no bearing upon the question here.

The plaintiff-appellant urges three points as grounds for reversal. 1. Before a modification of a provision awarding alimony in an original divorce decree, a material change in circumstances must be asserted and proved by the petitioner, and the burden of proof lies with the petitioner. 2. The lower court abused its discretion in granting the petition for discontinuance of alimony. 3. Termination of an award of alimony cannot be sustained, unless, the equities are with the petitioner.

The three points so raised are so inter-related and go to the same ultimate point at issue that in order to avoid repetition and reiteration, they will be discussed under a single point, which this court feels will dispose of the matter, namely, did the trial court upon the issues and evidence presented, have the authority to modify the decree by discontinuing the alimony payments?

In discussing this matter it must be conceded that as a matter of law, in proper cases, the court has the legal authority to act. The Divorce Act, Chapter 40, Section 19, Illinois Revised Statutes, 1957, provides: "The court may, on application, from time to time, make such alterations in the allowance of alimony *** as shall appear reasonable and proper." This section has been construed in the case of Wiseman v. Wiseman 290 Ill. App. 535, in the following language: "The only authority for modifying a decree of divorce, which obligates a party to

that only related to the reduction of the amount of money to be paid for the support of the children. That action, entered on May 31, 1955, can have no bearing upon the question here.

The plaintiff-appellant urges three points as grounds for reversal. 1. Before a modification of a previous award of alimony in an original divorce decree, a material change in circumstances must be ascertained and proved by the parties, and the burden of proof lies with the wife. 2. Termination of alimony cannot be sustained, unless, the wife is able to support herself. 3. The three points are related and no one of them can stand alone. The same mistake point is made that in order to modify alimony and restoration, they will be considered as a whole, and which this court feels will be one of the most serious, and the trial court upon the facts and evidence presented, and the authority to modify the decree in this matter is clearly established.

In discussing this matter it must be pointed out that in support of law, in proper cases, the court has the legal authority to act. The Illinois Act, Chapter 10, Section 10, Illinois Revised Statutes, 1955, provides: "The court may, on application, from time to time, make such alterations in the amount of alimony as shall appear reasonable and proper."

This section has been construed in the case of Edward V. Higgins, 290 Ill. App. 535, in the following language: "The only authority for modifying a decree of divorce, which obligates a party to

make periodic payments of alimony, is Ill. State Bar Stats. 1935, Chapter 40 Section 19... providing inter alia that the court may on application, from time to time, make such alterations in its terms as to alimony payments as shall be reasonable and proper. This section has been construed to mean that it only empowers the chancellor to alter the decree for alimony when the situation or condition of the parties, or at least one of them, has changed since the rendition of the decree, and that this is the sole and only cause which authorizes a readjustment of alimony by supplemental decree. Smith v. Smith, 334 Ill. 370; Herrick v. Herrick, 319 Ill. 146; Maginnis v. Maginnis, 323 Ill. 113."

By this construction, our courts have narrowed the authority of a court to alter the terms of the original decree only where the situation or condition of the parties, or at least one of them, has changed since the rendition of the decree.

There must be a change in the situation or condition of the parties, in order to give the courts authority to modify the original decree. Winkenwerder v. Winkenwerder, 349 Ill. App. 161; Smith v. Smith, 334 Ill. 370. The fact that there was a prior agreement between the parties, does not alter the right of the court to modify the original decree, since the allowance of alimony is not contractual. Maginnis v. Maginnis, 323 Ill. 113; Walters v. Walters, 341 Ill. App. 561.

It must follow as a necessary corollary that if the law requires a change in the condition or situation of the parties, before the court is authorized to modify the decree, that where

make periodic payments of alimony, is ill. cases for years. 1915.
Chapter 40 Section 19... providing that the court may
on application, from time to time, make such alterations in the
terms as to alimony payments as shall be reasonable and proper.
This section has been construed so that it is not intended that the
chancellor to alter the decree for alimony when the condition of
condition of the parties, or as least one of them, has changed
since the rendition of the decree, and that it is not intended that
only cause which entitles a party to a modification of alimony, but for
mental distress. Smith v. Smith, 101 Ill. 2d 111, 112, 113.

By this construction, the court has affirmed the authority
ity of a court to alter the terms of the original decree where
where the situation or condition of the parties, or of one of them,
of them, has changed since the rendition of the decree.
There must be a change in the situation or condition of
parties, in order to give the court authority to modify the
original decree. Johnson v. Johnson, 101 Ill. 2d 111, 112, 113.
Smith v. Smith, 101 Ill. 2d 111, 112, 113. The fact that there is an
agreement between the parties, made at the time the decree is
court to modify the original decree, since the situation of the
party is not controlling. Johnson v. Johnson, 101 Ill. 2d 111, 112, 113.

See v. Walters, 101 Ill. 2d 111, 112, 113.
It must follow as a necessary corollary that if the law
requires a change in the condition or situation of the parties,
before the court is authorized to modify the decree, that there

the evidence convinces the trial court that a change has occurred, the court does have the power to modify. This has been asserted in a number of cases. In the case of Byerly v. Byerly, 363 Ill. 517, at page 526, that court said: "If the circumstances of the parties change, upon proper showing the court may increase or decrease the amount of alimony as conditions may warrant."

In the case of Walters v. Walters, 341 Ill. App. 561, at page 567, the court in discussing alimony said: "It is for an indefinite period of time and usually for an indefinite total sum. It is based upon the husband's income and the needs of the wife determined from the standpoint of the manner in which they have been accustomed to live. It is modifiable after decree when the wife's needs increase or decrease, or when the husband's ability to pay increases or decreases. This is so because it takes the form of periodic allowances which do not vest until they become due."

In the case of Maginnis v. Maginnis, 323 Ill. 113, it was held that where the provisions for alimony in the decree takes the form of a periodic allowance, the divorce act gives the court authority, on application, from time to time, to make such alterations in the allowance of alimony and maintenance, and the care, custody and support of the children, as shall appear reasonable and proper, and that the power to make such modifications is not exhausted by the entry of the original order fixing the amount, but under the statute is a continuing power to modify the provisions of the decree in that respect at any

time, according to the varying needs and circumstances of the parties. This power of the court to modify upon showing of changed circumstances has been upheld in Hoover v. Hoover, 307 Ill. App. 590 and Garrett v. Garrett, 252 Ill. 318, and other cases.

Since the court does have the power and authority to modify in proper cases, it is necessary to examine the evidence and exhibits to determine whether or not any change of circumstances as to either party has been shown. The evidence as to the circumstances of the defendant show that his income has remained approximately the same. He has since remarried, and his present wife has an income of approximately \$225.00 per month net, which added to the net income of the defendant, shows a family income of approximately \$575.00 per month. While the income of the defendant has remained the same, his expenses have increased. He pays more for rent, his travel expenses have gone up and of course food and clothing expenses, with a wife to support have increased. It has been called to our attention that there is an error in the computation of the monthly family expenses of the defendant in the sum of \$100.00, the corrected amount being \$450.38 instead of the sum of \$550.38 as shown in the record and the exhibits. However, in considering the circumstances of the defendant, as of March 30, 1953, when the original decree for alimony was entered, and as of April 12, 1957, it would appear that the ability to pay of the defendant has decreased. It is not necessary that the circumstances of both parties change, but if the

circumstances of either change, the court is justified in taking such action as the circumstances warrant. Considering the circumstances of the plaintiff, the evidence shows that at the time of the divorce and the entry of the alimony order, the income of the plaintiff was \$140.00 per month. This has increased to \$225.00. Her lodging and household expenses have apparently decreased, since moving in with her mother. Her banking deposits have changed very little. The income from the farm in which she was the owner of a one-sixth interest has increased from \$353.55 in 1953 to \$1,500.00 for 1956. Leaving the other items out of the calculation and only considering salary income and farm income, the income of the plaintiff has increased from approximately \$2,000.00 in 1953 to \$4,200.00 in 1956, and presumably was the same for 1957. In the absence of palpable error this court will not attempt to pass on the question of fact before the trial court, but the figures are stated only to show that there were questions of change of circumstances of the parties before the court.

The question then arises, were there sufficient facts before the trial court to justify the entering of the order modifying the decree. As we have said, this is a question of fact, and this court has repeatedly held that on questions of fact, this court will not attempt to substitute its opinion for that of the trial judge or jury who heard the witnesses, observed their demeanor, and were in much better position to determine such questions.

circumstances of either change, the court is justified in taking such action as the circumstances warrant. Considering the circumstances of the plaintiff, the evidence shows that at the time of the divorce and the entry of the alimony order, the income of the plaintiff was \$10,000 per annum. This has increased to \$25,000. Her salary and household expenses have also increased, since moving to New York. Her husband's position have changed very little. The income from the land in which she was the owner of a one-third interest has increased from \$1,000 in 1937 to \$1,500 for 1941. In view of the fact that the calculation and only considering the income from the land, the income of the plaintiff has increased from \$1,000 in 1937 to \$2,500 in 1941, and, therefore, was the same for 1937. In the absence of evidence that the court will not attempt to take on a question of fact before the trial court, but the figures are based only on what the parties have presented in a matter of circumstances of the parties before the court.

The question then arises, were there sufficient facts before the trial court to justify the entry of the order modifying the decree. As we have said, this is a matter of fact, and this court has repeatedly held that on questions of fact this court will not attempt to substitute its opinion for that of the trial judge or jury who heard the witnesses, observed their demeanor, and saw in each person's action to determine such questions.

In the case of Herrick v. Herrick, 319 Ill. 146, which was a case involving alimony, the court there said: "The order was entered after a full hearing before the chancellor, and we are not prepared to say that the modification with respect to the amount of the payments required was not warranted by the evidence."

In the case of Zimmerman v. Zimmerman, 242 Ill. 552, at page 559 we find this language with citations: "A Court of review will not disturb the findings of fact of the chancellor*** unless it is apparent that clear and palpable error has been committed."

In this case the same chancellor presided at the time the divorce was granted, and the entry of the decree for alimony; at the time the decree was modified with respect to support and maintenance money, and at the time the order was entered discontinuing the alimony payments. This chancellor had full knowledge of all the evidence, and this court is not prepared to say that there was an abuse of discretion in ordering the alimony payments discontinued. The matter rested within the sound discretion of the court and its decision will not be disturbed by this court.

For the reasons stated, the decree as modified, is affirmed.

Affirmed.

Carroll, J. and Roeth, P.J. concur.

In the case of Hartick v. Hartick, 219 Ill. 144, which

was a case involving alimony, the court there said: "The
order was entered after a full hearing before the chancellor,
and we are not prepared to say that the modification with
respect to the amount of the payments required was not warranted
by the evidence."

In the case of Sturges v. Sturges, 219 Ill. 144, 145,
page 229 we find this language: "The chancellor's order of
view will not disturb the finding of fact in the case."
It is apparent that the chancellor's order was not
corrected."

In this case the chancellor's order of view was
quarantined and stayed, and the court in the case of Sturges
the time the decree was entered was not disturbed. The
maintenance money, and at the time the order was entered the
containing the alimony payment. This chancellor's order will
knowledge of all the evidence, and the court is not prepared to
say that there was an abuse of discretion in making the order.
The chancellor's order will not be disturbed.
discretion of the court and the evidence will not be disturbed
by this court.

For the reasons stated, the decree is affirmed, the alimony

affirmed.

Connelly, J. and Heath, J.J. concur.

377 A

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10177

Agenda No. 7

Louis L. Mason and Francis R.
Wiley,

Plaintiffs-Appellants,

vs.

The National Bank of Decatur,
a Corporation, as Conservator
of the Estate of Anna S. Pitz,
an Incompetent,

Defendant-Appellee.

15-21-365
Appeal from the
Circuit Court of
Macon County.

REYNOLDS, J.

The plaintiffs, Louis L. Mason and Francis R. Wiley are practicing attorneys of Decatur, Illinois, practicing individually. They appear as plaintiffs in this cause for the reason that they were associated together in representing one Anna S. Pitz, an incompetent person, in the County Court of Macon County, Illinois, in an effort to have the said Anna S. Pitz restored to competency. These two attorneys filed a petition for restoration of the civil rights of Mrs. Pitz in the Macon County Court, and a trial was had before a jury in that court, lasting five days, and the jury's verdict

Abstract

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STATE OF TEXAS
COUNTY OF DALLAS
FILE NO. 10177

General of 10177

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James L. Brown and John A. Wiley

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The National and of Texas
Corporation, as
of the state of Texas
at the county of Dallas

James L. Brown and John A. Wiley

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James L. Brown and John A. Wiley

James L. Brown and John A. Wiley

was that Mrs. Pitz should not be restored to competency. At the time of the hearing and jury trial, the Edgar County National Bank was the then acting and qualified conservator of Mrs. Pitz, but later that bank filed its final report and resigned as conservator, and The National Bank of Decatur was appointed, and is now, the conservator of the estate of Mrs. Pitz. The plaintiffs filed their petition for their attorney's fees in the County Court of Macon County, and that Court, on January 16, 1956, denied the petition. The cause was then appealed to the Circuit Court of Macon County, and heard by that Court without a jury. On November 6, 1957, the Circuit Court disallowed the petition, and entered judgment against the plaintiffs for costs. From that judgment the plaintiffs appeal to this court.

It appears that Attorney Mason was called by Mrs. Martha Smith, a neighbor of Mrs. Pitz, sometime in June or July of 1954, and asked to come see Mrs. Pitz. He did so, and agreed to represent her in an effort to have her restored to competency. Mrs. Smith, who was present during the first conversation between Mr. Mason and Mrs. Pitz, testified that Mrs. Pitz asked him what his fees would be and that he stated that they would be \$1500 if he won the case. According to Mrs. Smith's testimony, nothing was said about the fees if he lost the case. Mrs. Pitz, who was incompetent at the time, first testified that in her conversation with Mr. Mason he

was that Mrs. Pitt should not be restored to competency. At the time of the hearing and jury trial, the wife, Mary National Bank was the then acting and controlling conservator of Mrs. Pitt, but later that bank filed its final report and resigned as conservator, and the National Bank of Chicago was appointed, and as now, the conservator of the wife, Mary Pitt. The plaintiff filed a bill with petition for appointment of a guardian of the person and estate of Mrs. Pitt in the County Court of Cook County, Illinois, on January 18, 1935, before the office of the County Clerk by appeal to the Circuit Court of Cook County, Illinois, that Court affirmed a jury, a verdict of \$100,000, and the Court dismissed the bill, and the plaintiff appealed to the Circuit Court of Cook County, Illinois, and the plaintiff appealed to this court.

It appears that the bill was filed in the Circuit Court of Cook County, Illinois, on January 18, 1935, and that the bill was dismissed by the Circuit Court of Cook County, Illinois, on January 18, 1935, and that the plaintiff appealed to this court.

Mrs. Pitt asked him what her husband had done and he answered that they would be 1935 if he was the same, otherwise, to Mrs. Pitt's testimony, nothing was done about the test in he lost the case. Mr. Pitt, who was present at the time, first testified that he had conversation with Mr. Pitt in

said he would charge her \$1500 if he won the case and nothing if he lost. Later in testimony she said she was talking to Mr. Mason about another case. Some time later, Attorney Mason contacted Attorney Wiley and asked him to associate himself in the case and Mr. Wiley agreed to and did work with Mr. Mason in the hearing before the County Court before the jury, and in preparation for the trial. Both attorneys testified that they spent a number of days in preparation for trial, interviewing witnesses and doctors, writing letters and reading law books. There is nothing in the record to show any discussion by Mr. Wiley with anyone at any time concerning fees. He did talk with Mr. Mason and told him there could be no contract with Mrs. Pitz since she was an incompetent and that they would have to proceed without a contract. However, on August 24, 1954, in the office of Attorney Mason, without the knowledge or consent of Mr. Wiley, an agreement was drawn up and signed by Luther F. Pitz, the husband, whereby he agreed to pay Mason and Wiley all their expenses, and all doctors fees and all court costs and to give to them a sum equal to one-third of any amount they recovered by settlement, suit or compromise, with the understanding that they were to receive a minimum of \$1500, or whichever was greater. (Defendant's Exhibit 1.) This agreement also stated, although not signed by Mrs. Pitz, that Mrs. Pitz understood the business and although then technically adjudicated incompetent, she believed herself to

said he would charge her \$100 if he won the case and nothing if he lost. Later in testimony she said she was talking to Mr. Mason about another case. Some time later, Attorney Mason contacted Attorney Wiley and asked him to associate himself in the case and Mr. Wiley agreed to and did work with Mr. Mason in the hearing before the County Court before the jury, and in preparation for the trial. Both attorneys testified that they spent a number of days in preparation for trial, interviewing witnesses and doctors, writing letters and reading law books. There is nothing in the record to show any discussion by Mr. Wiley with anyone at any time concerning fees. He did talk with Mr. Mason and told him there could be no contact with Mrs. Rita since she was an inmate and that they would have to proceed without a contract. However, on August 24, 1954, in the office of Attorney Mason, with the knowledge or consent of Mr. Wiley, an agreement was drawn up and signed by Luther F. Witt, the husband, whereby he agreed to pay Mason and Wiley all their expenses, and all lost wages, and all court costs and to give to them a sum equal to one-third of any amount they recovered by settlement, suit or compromise, with the understanding that they were to receive a minimum of \$1500, or whatever was greater. (Exhibit 1.) This agreement also stated, although not signed by Mrs. Witt, that Mrs. Witt understood the agreement and although from technicality adjudicated incompetent, she believed herself to

be competent, and that she approved the action of her husband in her behalf and that when restored to competency, she would sign the above agreement.

The two attorneys prosecute their claim for fees on the theory that they are entitled to the fees on a quantum meruit basis. The defendant defends on the theory that there was an express agreement between Mrs. Fitz and Mr. Mason, which while not binding Mrs. Fitz, because of her incompetency, does bind Mr. Mason. The defendant further contends that Mr. Wiley, as an associate of Mr. Mason was employed by Mr. Mason and that Mr. Mason had no authority to impose any fee of Mr. Wiley upon his client without authority; that Mr. Mason was bound by the claimed conditional fee arrangement with Mrs. Fitz, and that Mr. Wiley was likewise bound.

Any decision of this cause must rest upon a determination of whether or not there was a discussion of fees between Mrs. Fitz and Mr. Mason, and if so, was Mr. Mason bound by it. And the further question, in view of the facts as disclosed by the evidence, that Mr. Wiley associated himself in the case without any discussion of fees with his client at any time, and became associated in the case at the request of Mr. Mason, was Mr. Wiley bound by the alleged conditional arrangement?

In passing on these questions, this court will abide by the announced rule of reviewing courts as to questions of fact, decided by a court, namely, that where the evidence is

be competent, and that she approved the action of her husband in her behalf, and that when restored to competency, she would sign the above agreement.

The two attorneys prosecute their claim for fees on the theory that they are entitled to the fees on a quantum meruit basis. The defendant defends on the theory that there was an express agreement between Mrs. Lisa and Mr. Mason, which while not binding Mrs. Lisa, because of her incompetency, was binding on Mr. Mason. The defendant further contends that Mr. Wiley, as an associate of Mr. Mason was employed by Mr. Mason on that Mr. Mason had no authority to require any fee of Mr. Wiley upon his client without authority; that Mr. Mason was bound by the claimed conditional fee arrangement with Mr. Lisa, and that Mr. Wiley was likewise bound.

Any decision of this case must rest upon a determination of whether or not there was a transaction of fees between Mrs. Lisa and Mr. Mason, and if so, was Mr. Mason bound by it. And the further question, in view of the facts as disclosed by the evidence, that Mr. Wiley also joined himself in the case without any discussion of fees with his client at any time, and became associated in the case at the request of Mr. Mason, was Mr. Wiley bound by the alleged conditional arrangement. In passing on these questions, this court will adhere by the announced rule of reviewing courts as to questions of fact, decided by a court, namely, that where the evidence is

conflicting the conclusion of the trial judge who saw and heard the witnesses and had advantages not possessed by the reviewing court in judging the weight of their testimony should not be disturbed unless clearly wrong. City of Quincy v. Kemper, 304 Ill. 303; Copple v. Scott, 372 Ill. 307; Bella v. Henry, 336 Ill. App. 525; Fence Co. of America v. Scott-Ballantyne Co., 349 Ill. App. 467; Dobie v. Livengood, 12 Ill. App. 2d 343; Horn v. Horn, 5 Ill. App. 2d 346.

While a contract entered into by an incompetent is not binding upon the incompetent, the person making the contract with the incompetent is bound. Section 278 of Chapter 3, Illinois Revised Statutes, says: "Every note, bill, bond, or other contract by any person who is an adjudged insane, an adjudged mentally ill, an adjudged mentally deficient, an adjudged feeble minded, or an adjudged incompetent person is void as against that person and his estate, but a person making a contract with the adjudged insane, adjudged mentally ill, adjudged mentally deficient, adjudged feeble minded or adjudged incompetent person is bound thereby."

If there was a contract entered into by attorney Jason and Mrs. Pitz, with regard to his fees, the attorney is bound, although Mrs. Pitz is not so bound. The testimony of Mrs. Martha Smith is very definite on that point. She testified that there was a discussion of fees and Mr. Jason stated that his fee would be \$1500 if he won the case; that there was no mention of fees if he lost the case. Mrs. Pitz, while somewhat confused as to the nature of the case was equally positive

conflicting the conclusion of the trial judge who saw and heard the witnesses and had advantages not possessed by the reviewing court in judging the weight of their testimony should not be

disturbed unless clearly wrong. City of Chicago v. Board of Education, 304 Ill. 303; People v. Abbott, 373 Ill. 307; People v. Henry, 330 Ill. App. 325; People v. Board of Education, 330 Ill. App. 487; People v. Liveness, 12 Ill. App. 10 313; People v. Liveness, 12 Ill. App. 24 346.

While a contract entered into by an infant is not binding upon the infant, the contract is not void with the infant in person. People v. Board of Education, 330 Ill. App. 325; People v. Board of Education, 330 Ill. App. 487; People v. Liveness, 12 Ill. App. 10 313; People v. Liveness, 12 Ill. App. 24 346. other contract by a person who is a minor, is not void, but is subject to being set aside by the court. People v. Board of Education, 330 Ill. App. 325; People v. Board of Education, 330 Ill. App. 487; People v. Liveness, 12 Ill. App. 10 313; People v. Liveness, 12 Ill. App. 24 346. void as against the person of the minor, and is not binding upon the minor. People v. Board of Education, 330 Ill. App. 325; People v. Board of Education, 330 Ill. App. 487; People v. Liveness, 12 Ill. App. 10 313; People v. Liveness, 12 Ill. App. 24 346. a contract with the minor is not void, but is subject to being set aside by the court. People v. Board of Education, 330 Ill. App. 325; People v. Board of Education, 330 Ill. App. 487; People v. Liveness, 12 Ill. App. 10 313; People v. Liveness, 12 Ill. App. 24 346.

independent person is a minor. People v. Board of Education, 330 Ill. App. 325; People v. Board of Education, 330 Ill. App. 487; People v. Liveness, 12 Ill. App. 10 313; People v. Liveness, 12 Ill. App. 24 346. If there was a contract entered into by a minor, it is not void, but is subject to being set aside by the court. People v. Board of Education, 330 Ill. App. 325; People v. Board of Education, 330 Ill. App. 487; People v. Liveness, 12 Ill. App. 10 313; People v. Liveness, 12 Ill. App. 24 346. and the law, and regard to the law, the contract is binding, although the law is not binding. People v. Board of Education, 330 Ill. App. 325; People v. Board of Education, 330 Ill. App. 487; People v. Liveness, 12 Ill. App. 10 313; People v. Liveness, 12 Ill. App. 24 346. Martha Smith is very definite on that point, and she is satisfied that there was a discussion of the law, and that she was not his law. People v. Board of Education, 330 Ill. App. 325; People v. Board of Education, 330 Ill. App. 487; People v. Liveness, 12 Ill. App. 10 313; People v. Liveness, 12 Ill. App. 24 346. his law would be void if he was the law, that there was no mention of the law if he lost the case. People v. Board of Education, 330 Ill. App. 325; People v. Board of Education, 330 Ill. App. 487; People v. Liveness, 12 Ill. App. 10 313; People v. Liveness, 12 Ill. App. 24 346. continued as to the nature of the case was equally positive

that Mr. Mason stated he would charge \$1500 if he won the case and nothing if he did not win. Mr. Mason denies that any conversation as testified by Mrs. Smith took place. Mr. Wiley did not talk to anyone about fees at any time, and did not hear any discussion of fees by anyone else. Mr. Pitz stated he did not hear any conversation between his wife and Mr. Mason as to fees. The agreement of Mr. Pitz, signed in Mr. Mason's office is inconclusive in that it does not refer to the competency proceedings, but refers to an amount to be recovered by settlement, suit or compromise.

In Illinois there is no question of the validity of a conditional fee arrangement between the attorney and his client. Such conditional arrangements for fees have been upheld. In a very old case, Newkirk v. Cone, 18 Ill. 449, our Supreme Court said: "As a general rule, all contracts between individuals, not inhibited by law, and not in contravention of public policy, arising out of the law, are valid. We are aware of no law or public policy in this state which would deprive a person, claiming a right, from contracting to pay for legal services, in vindicating it, a stipulated portion of the thing, or of the value of the thing, when recovered, dependent solely upon such recovery, instead of paying, or contracting to pay, absolutely, a sum certain. The suitor may be unable to pay in advance, and without credit, or he

that Mr. Mason stated he would charge \$1500 if he won the case and nothing if he did not win. Mr. Mason denies that any conversation as testified by Mrs. Smith took place. Mr. Wiley did not talk to anyone about fees at any time, and did not hear any discussion of fees by anyone else. Mr. Wiley stated he did not hear any conversation between his wife and Mr. Mason as to fees. The agreement of Mr. Wiley, signed in Mr. Mason's office is inconclusive in that it does not refer to the competency proceedings, but refers to an amount to be recovered by settlement, suit or compromise. In Illinois there is no question of the validity of a conditional fee arrangement between the attorney and his client. Such conditional arrangements have been upheld. In a very old case, Ex parte v. Jones, 13 Ill. 447, our Supreme Court said: "It is general and all contracts between individuals, not prohibited by law, and not in contravention of public policy, binding on the law, and valid. We are aware of no law or public policy, in this state which would deprive a person, claiming a right, from contracting to pay for legal services, in vindicating it, a stipulated portion of the thing, or of the value of the thing, when recovered, dependent solely upon such recovery, instead of paying, or contracting to pay, absolutely, a sum certain. The matter may be made to pay in advance, and without credit, or he

may deem such an arrangement most prudent and best calculated to insure vigilance on the part of his counsel." We find no decisions of our courts to the contrary of the doctrine announced in that case.

In deciding the cause in the Circuit Court, the trial court denied the petition for allowance for attorney's fees on the ground that the claimant Louis L. Mason contracted with the incompetent Anna S. Pitz, upon a contingent basis, and under said contract is entitled to nothing. In so deciding the trial court held that such an arrangement was entered into by the petitioner Mason and the incompetent. Since this was a matter upon which the evidence was conflicting, and there being competent evidence in the record to support such a finding, this court will not disturb such a decision. But the petitioner claims that there was no acceptance of any offer on the part of Mrs. Pitz, and there can be no contract. The case of Bladel v. Carroll, 336 Ill. 168 is cited, but that case is not in point. In that case, which was a suit for specific performance of a written contract for the sale of real estate, a certain statement by one party was made in the presence of the other party and the other party neither assented nor objected, but made no reply. The court based its opinion that there was an abandonment of the original contract and no renewal of the new one, except the statement made by the one party and not agreed or assented to by the other. The case of Bartlett v. Huff, 271 Ill. App. 551, cited by the plaintiff is another case where

there is no meeting of minds. In that case the price was discussed, but nothing else, and the court held that "The chief requirement is that the promise shall be sufficiently certain in its terms to enable the court to understand what the promisor undertakes."

The claimants under the authority of Templeman v. Pierson, 334 Ill. App. 1, base their claims under quantum meruit, and on the premise that their services, like the services in the Templeman case, should be classed as necessities. In that case, as in this case, the attorneys were contacted thru a friend of the incompetent. And as in this case, an attempt was made to have the patient's competency restored and there an attempt was made to have her released from the hospital and permitted to live out her days at home. In that case the attorneys devoted a considerable amount of their time and talents in an effort to secure the release of the incompetent. They filed a petition for attorney's fees and it was allowed, on the theory of quantum meruit, the court saying: "In this case, no claim is made that an express contract existed. Our opinion is that the services rendered on behalf of Mrs. Rainey may be considered as necessities and claimants ought to recover for the reasonable value thereof." There no express contract was claimed, but in this case, an express contract was alleged, and determined to exist by the trial court. That being so, the law as laid down in the Templeman v. Pierson case is not applicable.

there is no meeting of minds. In that case the price was
discussed, but nothing else, and the court held that "The
chief requirement is that the promise shall be sufficiently
certain in its terms to enable the court to understand what the
promisor undertakes."

The claimants under the authority of Templeman v. Harrison,
334 Ill. App. 1, base their claim under quantum meruit, on
the promise that their services, like the service in the
Templeman case, should be classed as necessaries. In that case,
as in this case, the attorneys were retained for legal services
of the incompetent, and in this case, as in that case, were
to have the patient's completey recovered and there an effort
was made to have her released from the hospital and permitted
to live out her days at home. In that case the attorneys
devoted a considerable amount of their time and talent in an
effort to secure the release of the incompetent. They filed
a petition for attorney's fees and it was allowed, on the theory
of quantum meruit, the court saying: "In this case, no claim
is made that an express contract existed. It is claimed that
the services rendered on behalf of the incompetent may be considered
as necessities and disbursements on all to recover for the reasonable
value thereof." There no express contract was claimed, but in
this case, an express contract was alleged, but determined to
exist by the trial court. That being so, the law as laid down
in the Templeman v. Harrison case is not applicable.

As to the petitioner Mason, we must hold that he entered into a contingent fee agreement with Mrs. Pitz, which was binding upon him; that by the terms of this contingent fee agreement he was to be paid \$1500.00 if he was successful in having her restored to competency and nothing if he failed. He failed and was therefore entitled to nothing.

As to the petitioner Wiley, it is not disputed that so far as he was concerned no discussion of fees was had by him with the incompetent, her husband, or by his co-counsel, except that he did remark to petitioner Mason that Mrs. Pitz, being an incompetent, any contract with her would be void. That is true as to Mrs. Pitz' liability under any contract entered into by her, but by the law of the Statutes of Illinois, Section 278, Chapter 3, it is not true as to the person or persons contracting with her. While her contract to pay \$1500.00 in attorney fees to Mr. Mason if he was successful in having her restored to competency was not binding upon her, it was, by the terms of the statute, binding upon Mr. Mason.

According to the testimony Mr. Wiley was asked by Mr. Mason to associate with him in the case. There was only one fee agreement, namely the \$1500.00 contingent one. If the two attorneys had won the case, and even if Mrs. Pitz could be held liable, she would only be liable for the one fee, namely \$1500.00. Evidently Mr. Mason had in mind the one fee when he dictated and had Mr. Pitz sign Defendant's Exhibit 1. There is nothing in the record to indicate that Mrs. Pitz or her husband

As to the petitioner's action, we must hold that he entered into a contingent fee agreement with Mrs. Litch, which was binding upon him; that by the terms of this contingent fee agreement he was to be paid \$1500.00 if he was successful in having her restored to competency and nothing if he failed. He failed and was therefore entitled to nothing.

As to the petitioner's claim, it is not disputed that as far as he was concerned no discussion of fees was had by him with the incompetent, her husband, or by his co-counsel, except that he did remain in possession of the fee. Mrs. Litch, being an incompetent, any contract with her would be void. That is true as to Mrs. Litch's liability under any contract entered into by her, but by the law of the State of Illinois, Section 378, Chapter 3, it is not true as to the person or persons contracting with her. While her contract to pay \$1500.00 to an attorney fees to Mr. Mason if he was successful in having her restored to competency was not binding upon her, it was, by the terms of the statute, binding upon Mr. Mason.

According to the testimony of Mr. Litch was said by Mr. Mason to associate with him in the case. There was only one fee agreement, namely the \$1500.00 contingent one. If the two attorneys had won the case, and even if Mrs. Litch could be held liable, she would only be liable for the one fee, namely \$1500.00. Evidently Mr. Mason had in mind the one fee when he dictated and had Mr. Litch sign Defendant's Exhibit I. There is nothing in the record to indicate that Mrs. Litch or her husband

ever assented to or understood that Mr. Wiley was to be paid an additional or separate fee. While we agree with the law as laid down in Continental Adj. Co. v. Hoffman, 123 Ill. App. 69, that one attorney, without the express consent of his client, cannot employ another attorney, as said in that case, "whatever his remedy may be for recovery of compensation for his services it is not against appellant." Applying the language of that case to this case, whatever may be due Mr. Wiley for his services, is due out of the money to be paid under the contingent fee agreement, and none being due, there is nothing due Mr. Wiley. Since there is nothing in the record to substantiate an implied agreement between Mr. Wiley and Mrs. Fitz, and there is evidence in the record that Mr. Wiley was procured by Mr. Mason and Mr. Mason was bound, it must logically follow that Mr. Wiley is bound by the contingent fee arrangement and agreement between Mr. Mason and Mrs. Fitz.

The judgment of the Circuit Court will be affirmed.

Affirmed.

Roeth, P. J. and Carroll, J. concur.

47233

PEOPLE OF THE STATE OF ILLINOIS,
ex rel., WALTER C. WILLIAMS,

Plaintiff-Appellee,

v.

TIMOTHY J. O'CONNOR, Commissioner
of Police of the City of Chicago,
WILLIAM A. LEE, ALBERT W. WILLIAMS
and JOHN J. AHERN, Members of the
Civil Service Commission of the City
of Chicago; CARL J. CHATTERS,
Comptroller of the City of Chicago;
and MORRIS B. SACHS, Treasurer of the
City of Chicago,

Defendants-Appellants.

18 I.A.^{2d} 539

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a mandamus action to reinstate a policeman in the Chicago Police Department and to recover salary from the date of his discharge. The trial court heard evidence, ordered the writ issued and entered judgment in relator's (Williams') favor for \$2,468.06. Defendants have appealed.

Williams passed a civil service examination for patrolman and was certified and appointed. He was suspended and discharged during the probationary period. The Commissioner of Police before discharging Williams wrote the Civil Service Commission asking authority for the discharge. The basis of the request was a medical report of the Director of Police Personnel giving an opinion that Williams would be unable to perform duties of a patrolman and recommending his suspension.

This report was based on a report from the "Temporary Chief Surgeon" to the Director stating that Williams had been



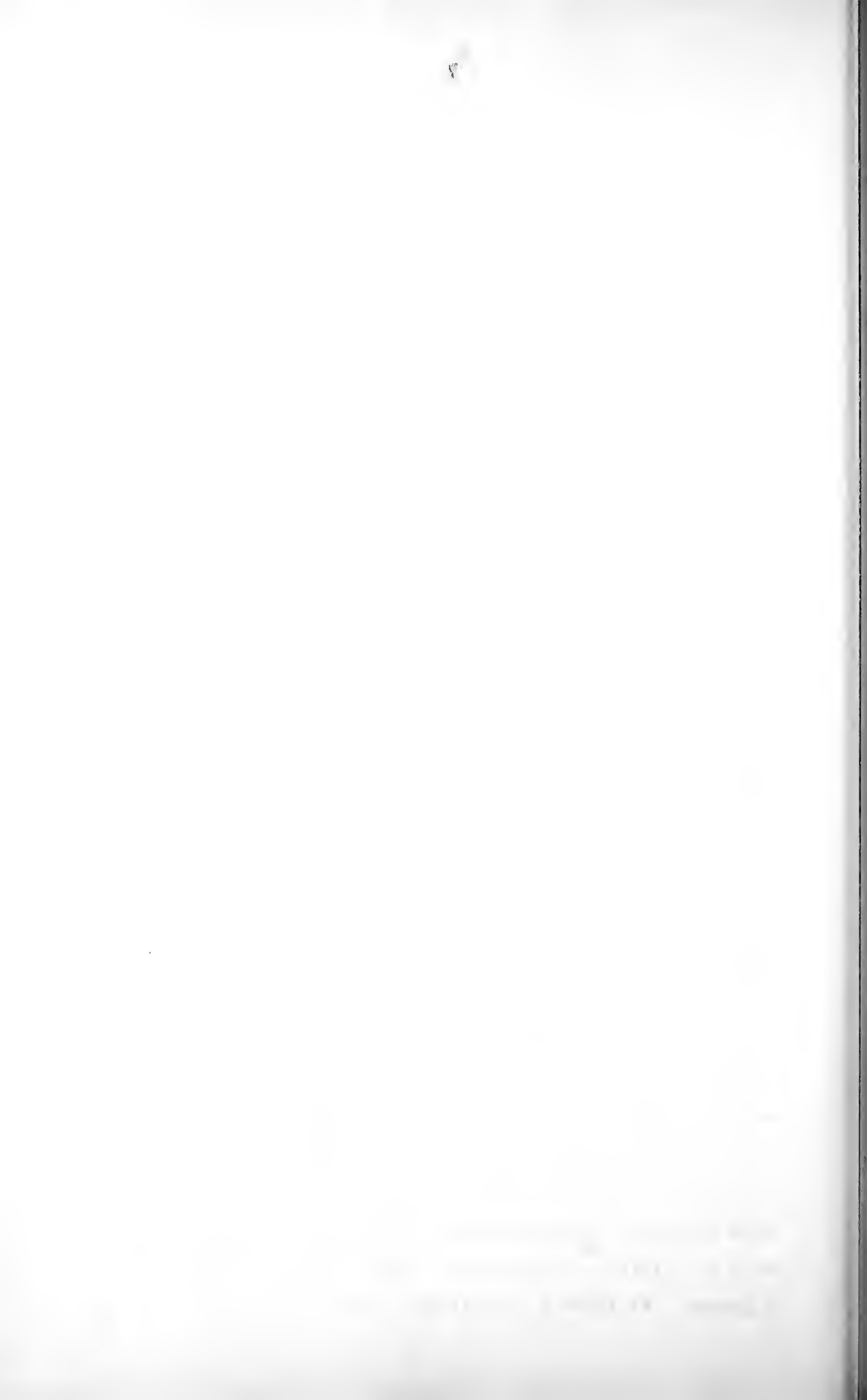
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given a medical discharge from the United States Army because of tuberculosis in 1944 and was given 100 per cent disability at the time; and that in 1945 the disability, after re-examination was reduced to 50 per cent. The report also stated: "Incapacities by reason of the very nature of the disease renders this man unfit for employment."

The Commission gave authority for the discharge.

A main issue here is whether the Commissioner of Police had power to re-examine plaintiff to determine his qualifications to be a policeman. Williams contends his discharge by the Commissioner was a usurpation of a function properly belonging to the Civil Service Commission. Defendants rely upon People ex rel. Ballinger v. O'Connor, 13 Ill. App. 2d 317. Williams' position is that he cannot distinguish that case, but that that decision is incorrect.

In that case the first division of this court passed on three issues, including the issue raised here: whether the Commissioner of Police had power to re-examine plaintiff to determine his qualification to be a policeman. The court held that the determination of the question of Ballinger's physical qualifications for the police department was within the power and discretion of the Commissioner of Police; that the Commissioner had not acted arbitrarily since he reached his conclusion relying on reports of his medical advisers and upon a scientific question about which experts "could and did have a difference of opinion." People ex rel. Ballinger v. O'Connor. We agree with that decision.



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Williams also contends there was no valid reason for, and no intelligent consent by the Commission to, his discharge. He implies a devious motive. These points were passed on by the court adversely to Ballinger in that case. We agree with the court's decision on those points. We conclude that the reason for Williams' discharge was valid and that there was sufficient knowledge given the Commission on which it could give an intelligent consent. The case of People ex rel. Vestuto v. O'Connor, 351 Ill. App. 539, is readily distinguishable on the facts.

We hold that mandamus does not lie to review the Commissioner's discretionary act and that this discharge was not irregular. The "Judgment-Order" is therefore reversed.

We need consider no other points raised.

REVERSED.

LEWE AND MURPHY, JJ., CONCUR.

ABSTRACT ONLY.

343

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47355

MILTON WALTON,

Appellant,

v.

WINTER & HIRSCH, INC.,

Appellee.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

18 I.A. 540²¹

MR. PRESIDING JUSTICE McCORMICK DELIVERED
THE OPINION OF THE COURT.

A suit at law was filed in the Municipal Court of Chicago by Milton Walton (hereafter referred to as plaintiff) against Winter & Hirsch, Inc., a corporation (hereafter referred to as defendant), to recover damages occasioned by an allegedly wrongful use of a demand in garnishment served upon plaintiff's employer by the defendant, as a result of which plaintiff's employment was terminated. The defendant was served with summons, and on April 20, 1956 an order of default was entered against it for want of an appearance. On May 24, 1956, the appearance of the defendant was filed, and, by agreement of the parties, the court entered an order vacating the default and defendant was ordered to file an answer to the statement of claim in ten days. The cause was set for trial in Room 910 on June 21, 1956. On March 21, 1957 the court, on an ex parte hearing, found for the plaintiff and against the defendant in the sum of \$500 and entered judgment accordingly. On motion and petition filed on May 16, 1957 to vacate the default judgment, after notice to plaintiff and after an answer to the petition was filed by the plaintiff, and after various continuances, the court on June 24, 1957 vacated the default judgment of March 21, 1957 and the defendant was given ten days to file a defense to



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the statement of claim, which defense was filed on July 1, 1957. From the order of June 24, 1957 vacating the default judgment this appeal was taken.

The grounds set up in support of the petition of the defendant to vacate the default judgment were, among other things, that the minute book of the clerk in Room 910 indicates that the file was short on June 21, 1956, that a line was drawn through the listed case together with a minus mark, and that underneath appears the date December 3, 1956, but that the case did not appear in the Municipal Court Record as having been continued, nor did it appear on the half sheet of the Municipal Court files, and that the statement of claim itself did not state a cause of action.

On December 11, 1957 we entered an order overruling defendant's motion to dismiss the appeal based on its suggestions that the appeal had not been filed in apt time. At that time we did not have before us the original notices of appeal from the files of the Municipal Court. This motion to dismiss was renewed by the defendant in its brief filed in this court. Under the statute (Ill. Rev. Stat. 1957, chap. 110, par. 76) the plaintiff in order to perfect his appeal, must have filed his notice of appeal in the trial court within sixty days from the date of the judgment. The last day for filing was August 23, 1957. The defendant brought to this court for our inspection the original notices of appeal filed in the Municipal Court, one of which bears on its back, as well as on the blue^{back} cover, a stamp of the Municipal Court indicating that it was filed on August 19, 1957. The stamp



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has a line followed by the word "Clerk" but in the line there is neither signature nor initials. On the front it bears a stamp of the Municipal Court of Chicago indicating that it was filed on August 26, 1957, and in the stamp is also included the signature of Joseph L. Gill, Clerk. That notice of appeal was dated August 19, 1957, but on its face it bears a receipt by the attorneys for the defendant dated August 20, 1957, together with an affidavit by one of the attorneys for the plaintiff in which he states that he served "a true and correct copy of the above and foregoing Notice of Appeal upon the defendant-appellee Winter & Hirsch, Inc., by personally delivering the same to its Attorneys, Hirsch & Persky, at 1844 South Michigan Ave., Chicago, Illinois * * *. Said service being made on the 20th day of August, 1957," and the jurat shows that this affidavit was sworn to before a notary public on August 21, 1957. On August 26, 1957 either the original or a copy of this document was filed and bears the filing stamp of the Municipal Court of Chicago. Both documents are alike in every respect. On August 26th there was also filed in the Municipal Court a notice to the attorneys for the defendant from the attorneys for the plaintiff which stated that on August 26, 1957 they would appear and present to the court for approval an appeal cost bond and it further stated "at that time we shall also file a notice of appeal and a praecipe for record, true copies of which were also personally served upon you on August 20, 1957."

The explanation of the confusion in dates made on oral argument by counsel for the plaintiff was not satisfactory. It would seem that this case distilled a subtle quintessence of the

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waters of nepenthe which so affected the attorneys for both plaintiff and defendant that they lost all sense of time. We find that the notice of appeal was not filed in apt time and the appeal is dismissed.

Appeal dismissed.

Robson and Schwartz, JJ., concur.

Abstract only.

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A

47373

ARTHUR M. KRENSKY & CO.,
INC.,

Appellant,

v.

HARRY J. ROTHMAN,
Defendant,

SOUTH EAST NATIONAL BANK
OF CHICAGO,
Garnishee below,

Appellee.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

13 I.A. 2d 540²

MR. PRESIDING JUSTICE McCORMICK DELIVERED
THE OPINION OF THE COURT.

This appeal is taken from a judgment against the garnishee defendant for \$679.02. It is presented to this court on a stipulation of facts.

January 11, 1957 Arthur M. Krensky & Co., Inc., (hereafter referred to as Krensky) filed garnishment proceedings against the garnishee defendant South East National Bank of Chicago (hereafter referred to as Bank) seeking to discover any assets of the defendant Harry J. Rothman (hereafter referred to as Rothman), against whom Krensky had recovered a judgment on January 3, 1957 in the sum of \$5,196.55 plus costs of \$24.10. On January 21, 1957 the Bank filed its answer in which it stated that it had no moneys, etc. owing to or belonging to Rothman. Motion was made to contest the answer, and on June 11, 1957 the court permitted the Bank to file an amended answer and the case was set for hearing on June 27, 1957.

The amended answer of the Bank set out that when it



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had filed its original answer on January 15, 1957 Rothman was indebted to the Bank upon his collateral note held by it in the unpaid principal sum of \$3,578.76; that as collateral security therefor Rothman had on deposit with the Bank 500 shares of the common capital stock of the Cuneo Press, Inc.; that on January 8, 1957 Rothman had sold 100 shares of the said stock at a price of \$8.37 per share and the net proceeds thereof in the sum of \$821.85 were paid over by the broker on January 22, 1957 and the Bank applied such sum on the principal and interest on the aforesaid note reducing the unpaid balance to \$2,756.91; that on February 7, 1957 Rothman sold the remaining 400 shares of the said collateral at a price of \$8.75 a share and out of the net proceeds thereof in the amount of \$3,435.93 the brokers remitted to the Bank the sum of \$2,830 in full payment of the balance due the Bank for principal and interest and expenses incurred on the said note; and that the excess in the sum of \$605.93 was paid by the brokers to Rothman.

On June 19, 1957 Krensky filed a traverse to the answer and amended answer of the Bank stating that the answer filed on January 21, 1957 of no funds was untrue and that the Bank filed its amended answer only after being served with a copy of Krensky's traverse and on June 11, 1957 first set forth the receipt of the stock; and Krensky prayed for the entry of an order on the Bank to turn over the said 500 shares of common stock to the sheriff of Cook County to be sold by him and



-3-

the proceeds applied in satisfaction of Krensky's judgment against Rothman, or in default thereof that \$4,375, being a fair cash market value of the shares of stock as of the date of the filing of the answer by the Bank, be applied as against the judgment due Krensky from Rothman, together with costs. It was also stipulated that during the period from January 7, 1957 to February 7, 1957 the prevailing market prices for the Cuneo Press, Inc. common stock on the New York Stock Exchange changed from 8 to 8-7/8; that on the date of the filing of the answer of the Bank the price was high 8-3/4, low 8-3/4; and that on February 7, 1957 the price was high 8-7/8, low 8-3/4.

The trial court found that Krensky was entitled to the sum of \$605.93 plus \$73.09, the amount applied by the Bank to interest and expenses on the note, and entered judgment in favor of Krensky and against the Bank for \$679.02.

Krensky contends that section 13 of the Garnishment Act (Ill. Rev. Stat. 1957, chap. 62), which provides that the garnishee may deduct out of the assets in his hands all demands against the plaintiff and against the defendant of which he could have availed himself if he had not been summoned as garnishee, could not be availed of by the Bank, it having filed an answer of no funds. The effect of garnishment is simply to subrogate the plaintiff or judgment creditor to whatever rights the judgment debtor may have against the garnishee, or, as otherwise stated, a creditor stands in exactly the same attitude in relation to the garnished property that the judgment debtor does.



A plaintiff by garnishment can acquire no greater rights against a garnishee than are possessed by the principal defendant.

20 I.L.P. Garnishment, sec. 51.

There is nothing in the record before us to indicate any fraud on the part of the Bank. Prior to the filing of the garnishment summons 100 shares of Rothman's stock held as collateral by the Bank had been sold, and after the filing of the no funds answer of the Bank the sum of \$821.85 was paid to the Bank and applied by it to the indebtedness on the note. On February 7, 1957 the remainder of the stock was sold, from which the Bank satisfied Rothman's indebtedness and paid over to him \$605.93. The trial court found in favor of Krensky for that sum plus \$73.09 which the Bank had charged Rothman for interest and expenses and entered judgment accordingly. There is nothing in the record which would indicate that Krensky by this transaction is in any worse position than it would have been had the Bank, when it filed its answer, admitted the indebtedness, sold the stock, applied the balance to the debt owed it by Rothman, and remitted the rest of the money to Krensky. It is the duty of the garnishee to hold the property in the condition in which it was at the time of garnishment, and if he changes it or converts it into money he may be held for the difference in value. 38 C.J.S. Garnishment, sec. 189. The cases cited by Rothman are not in point. In Burke v. Congress Hotel Co., 280 Ill. App. 493, it appears that Burke at the time that the answer was filed was indebted to the Congress Hotel Company. During the pendency of the suit the

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In Burke v. Congress Hotel Company

Garland, et al.

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garnishee paid Burke his full salary. The court held that having paid his full salary was an admission on the part of the hotel that it was indebted to Burke in the amount paid and that it could not claim a setoff against that sum as against the use-plaintiff in the garnishment proceedings. The other cases cited are of the same tenor. That is not the situation in the case before us. It is true that the first answer filed by the Bank should have set up the indebtedness, but at no time by its conduct, under the rule laid down in the Burke case, did the Bank acknowledge an indebtedness to Rothman greater than \$605.93, which sum was included in the judgment entered by the trial court.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Robson and Schwartz, JJ., concur.

Abstract only.

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47501

DIXSON D. GIFFORD, individually, and
d/b/a D. D. GIFFORD,

Appellee

-vs-

EDWARD P. DONOVAN, individually, and
d/b/a PREFERRED REALTY & BUILDERS, and
ALICE M. DONOVAN, his wife,

Appellants

INTERLOCUTORY

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

18 I.A.^{2d} 541

MR. PRESIDING JUSTICE McCORMICK DELIVERED
THE OPINION OF THE COURT.

This appeal is taken from an order of the Circuit Court denying defendants' motion to vacate an injunction order entered without notice and without bond and to dissolve the injunction writs issued thereunder restraining the defendants from disposing of certain assets and from conveying ninety lots described in the complaint, and also restraining three financial institutions from disbursing funds.

The complaint is in two counts. It was filed by Dixon D. Gifford, hereafter referred to as the plaintiff, against Edward P. Donovan, individually, and doing business as Preferred Realty & Builders, and Alice M. Donovan, his wife. In the first count it alleges in substance that on January 3, 1958 the plaintiff entered into a contract with the defendant Edward P. Donovan; that the said defendant at the time of the execution of the contract falsely and fraudulently represented to the plaintiff that if the contract was entered into by him that Donovan would pay to the plaintiff all sums then due and owing to the plaintiff by virtue of a previous agreement, whereas Donovan at the time did not intend to nor has he since paid to the plaintiff said sums of money though often requested so to do; that the representations were material and



were made with intent to induce the plaintiff to enter into the contract, and the plaintiff prays that the contract be cancelled and the court grant such other and further relief as may be just and equitable.

Count two in substance sets up that the plaintiff on February 4, 1956 entered into a certain contract with the defendant Edward P. Donovan by which they agreed that all net profit derived from the acquisition, subdividing and sale of certain described real estate would be distributed as therein agreed; "that the plaintiff has complied with all the terms of this contract and through his efforts these properties were acquired"; "that, commencing on the 4th day of February, 1956, down to and including the commencement of this action, the defendant, Edward P. Donovan, has collected under said contract large sums of money, the exact amount of which is not known to the plaintiff"; "that upon an accounting by the defendant, Edward P. Donovan, there will be found due to the plaintiff from the defendant, Edward P. Donovan, large sums of money in excess of Twenty-five Thousand Dollars (\$25,000.00)"; that the plaintiff before the commencement of the lawsuit has demanded of Donovan an accounting and a payment to the plaintiff of the money due the plaintiff under the contract but that Donovan has refused so to do; "that the plaintiff has reasonable grounds to believe that the defendant, Edward P. Donovan, will, upon knowledge of this law suit endeavor to disburse of his assets to the detriment of the plaintiff and that this action by the defendant, Edward P. Donovan, will cause irreparable damage to the plaintiff and there is no adequate remedy at law therefor"; that Donovan presently has in his custody and control funds belonging to both himself and the plaintiff, and the plaintiff has reason to believe that such sums



are now on deposit in certain designated financial institutions in the name of Edward P. Donovan, individually and/or Edward P. Donovan, d/b/a Preferred Realty & Builders. The plaintiff prays "that an injunctional order be entered, without notice, for the reason that the plaintiff believes that if notice were given, the defendant, Edward P. Donovan, might dispose or otherwise conceal those assets which the injunction is intended to preserve"; "that the plaintiff, Dixon D. Gifford, d/b/a D. D. Gifford be excused from giving bond"; that an accounting be had; that the designated financial institutions be enjoined from disbursing any of the funds credited to Donovan or to Donovan d/b/a Preferred Realty & Builders; that Donovan, d/b/a Preferred Realty & Builders, and Alice M. Donovan, his wife, be enjoined from executing any deeds or any instruments conveying or attempting to convey any interest in the real estate described in the complaint. The agreement between Donovan and Gifford dated January 3, 1958 and the agreement dated February 4, 1956 were attached to the complaint as exhibit A and exhibit B respectively.

The court on April 7, 1958 entered a temporary injunction order that writs of injunction issue enjoining "Edward P. Donovan, individually, and d/b/a Preferred Realty & Builders and Alice M. Donovan, his wife, from withdrawing or other [sic] disposing of the funds now on deposit" at certain named financial institutions; enjoining Donovan, individually, and d/b/a Preferred Realty & Builders and Alice M. Donovan from executing any deeds or instruments conveying or attempting to convey any interest or title in certain described real estate; and enjoining certain financial institutions from paying any money now credited to Edward P. Donovan, individually and d/b/a Preferred Realty and Builders and Alice M. Donovan, his wife, pending further order of the court; and further ordering "that this Writ of Injunction for good cause

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shown be and is hereby issued without notice; and "that Dixon D. Gifford, individually, and d/b/a D. D. Gifford, for good cause shown be and is hereby excused from giving bond." The writs of injunction prayed for were accordingly issued.

A motion filed by the defendants to vacate the injunction order on the grounds that the complaint did not state a sufficient cause of action and that the injunction was issued without notice and without bond contrary to the statute was denied, from which order of the trial court this appeal is taken.

Section 3 of the Injunctions Act (Ill. Rev. Stat. 1957, chap. 69, par. 3) provides that no injunction shall be allowed without previous notice of the time and place of the application being given to the defendants, unless it appears from the complaint or affidavit accompanying the same that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without notice, and section 9 of the same Act provides that in all cases where an injunction is allowed the plaintiff must give bond unless for good cause shown the court is of the opinion that the injunction ought to be granted without bond. In Brin v. Craig, 135 Ill. App. 301, 306, the court said:

"This court has spoken many times in no uncertain voice in condemnation of the practice of granting an injunction without notice unless it is made clearly and indisputably to appear from facts recited and verified, that the rights of a complainant will be unduly prejudiced unless the same be granted without notice. No presumptions are to be indulged in favor of action without notice, but parties must, on facts stated and sworn to, bring themselves within the exception of the statute before being entitled to an injunction without notice. Failing so to do, an injunction granted will be held to be improvident and dissolved."

To justify the grant of an injunction without notice the complaint alleges that the defendant Donovan has in his possession and control funds belonging both to himself and the plaintiff and that

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and control funds

the plaintiff has reasonable grounds to believe that the defendant would, if notified of the pending action, endeavor to dispose of his assets and if he did so it would cause irreparable injury to the plaintiff. The plaintiff has alleged no threats on the part of Donovan so to act, nor has he alleged anything from which it could be concluded that Donovan would take such action. The statement, standing alone, is a conclusion based on pure conjecture, and as the court says in Weinstein v. Levin, 317 Ill. App. 383, the rule is that "No presumptions are to be indulged in favor of action without notice ***" (Brin v. Craig, supra), and that 'either in the bill or affidavit such facts must be stated from which the court can see that irreparable injury will ensue unless the injunctional order prayed for is issued without notice.' (Rieder v. White, supra, [160 Ill. App. 576].)"

Plaintiff relies on the case of Mitchell v. Mitchell,

10 Ill.App.2d 437, in which the court says:

"Our courts have repeatedly recognized that where the assets involved are of such a nature that defendant can destroy the substance of the litigation 'by a stroke of the pen, a movement of the hand,' and where it appears from the pleadings that the plaintiff by reason of the past wrongful conduct of the party to be enjoined has good cause and reason to apprehend such action, the issuance of an injunction without notice will be allowed."

In that case the court held that the injunction was properly issued without notice and without bond, basing its holding on the fact that in the complaint the plaintiff had on information and belief alleged that the defendant had already attempted to conceal assets, and refers to the further fact that the subsequent conduct of the defendant, apparent in the record in withdrawing assets after the injunction had been issued and served, substantiated a conclusion that the apprehensions of the plaintiff were well founded. The plaintiff here contends that his allegation of fraud on the part of

the defendant Donovan in the first count of his complaint would bring him within the rule laid down in the Mitchell case. However, even if we assumed that the allegation concerning an act which Donovan was to perform in the future would be a proper allegation of fraud, it still falls far short of the allegations necessary to show such prior wrongful conduct on the part of the defendant from which it could properly be inferred that upon information reaching him of the pending lawsuit he would immediately dispose of all his assets, and such an allegation is not sufficient to permit the issuance of an injunction without notice which ties up all the money of the defendant and the property designated in the complaint.

The second contention of the defendants is that the injunction was improperly issued without bond, in violation of the statutory provisions. There is nothing in the complaint in support of such issuance to satisfy the statutory provision that an injunction cannot be issued without bond except for good cause shown. The only thing said in the complaint with reference to the issuance of an injunction without bond is a prayer that bond be excused. Nothing is set out whatsoever with reference to the financial condition of either the plaintiff or defendants. The allegations in the complaint are not sufficient to justify the issuance of an injunction without bond. In Grossman v. Grossman, 304 Ill. App. 507, the court says: "While the matter of allowing the issuance of an injunction without the giving of a bond rests largely in the sound discretion of the court, nevertheless, a sufficient showing must be made on which to base the discretion. (Peck v. Peck, 214 Ill. App. 41, 43.)" Nor is the recital in the order that "for good cause shown" the bond is excused sufficient, since no good cause is shown by the record. Weinstein v. Levin, supra; Wagner v. Okner, 306 Ill. App. 601. There is nothing in the complaint showing that the plaintiff had sufficient means to

respond in damages, and if the plaintiff was relying on that ground of excuse there should be a showing in the complaint or the affidavit indicating the financial condition of the plaintiff. Lee v. Morris, 326 Ill. App. 555; Admiral Trailer Mfg. Co. v. All States Trailer Company, 351 Ill. App. 513.

Lastly, the injunction restrained defendant Alice M. Donovan, the wife of Edward P. Donovan, from withdrawing any funds from the financial institutions named and enjoined said financial institutions from disbursing any funds to her. There is nothing in the complaint which might even vaguely support such an injunctional order, nor is there any prayer therefor.

The injunction was improvidently issued. The order denying defendants' motion to vacate and dissolve the injunctions is reversed, and the cause is remanded with directions that the court vacate its order of April 7, 1958 granting certain temporary injunctions and that the injunctions issued thereunder be dissolved.

REVERSED AND REMANDED WITH DIRECTIONS.

Robson and Schwartz, JJ., concur.

Abstract only.



246

A

47250

PHILIP D. ALVER,

Appellant,

v.

BROADWAY BUICK SALES
COMPANY, a corporation,

Appellee.

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

181A. 542

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff and counter-defendant from a judgment entered on a counterclaim in an action for declaratory judgment. Plaintiff is the purchaser of an automobile under a contract of conditional sale. Defendant is the seller. Plaintiff brought this action to have the contract declared valid. Defendant counterclaimed alleging fraud. Judgment was entered for defendant on the counterclaim and the question presented on appeal is whether or not the defendant established all the elements necessary to a recovery on the counterclaim.

On January 21, 1957, plaintiff went to the place of business of defendant to purchase an automobile. A salesman for defendant showed plaintiff several models from which plaintiff selected one available for delivery on the same day. The salesman then asked plaintiff if he had an automobile to trade in. Plaintiff replied that he had one parked in front of defendant's place of business. One Smithson, a vice-president of defendant, appraised plaintiff's car after driving it. He and the salesman together made out an appraisal slip in which plaintiff's old car was designated



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as a 1956 Ford Fairlane. The car was in fact a 1955 Ford Mainliner, an older and less expensive model.

The record indicates that several months earlier plaintiff had placed additional chrome on his car, giving it the external appearance of a more recent and expensive model than it really was. Plaintiff testified that he had merely wished to improve the appearance of the car and that he made no verbal representation concerning the year and model of the car to either the salesman or the appraiser. It is clear from the record that plaintiff was aware that both of the individuals with whom he was dealing believed they were accepting in trade a 1956 model automobile. Plaintiff did not have the registration certificate for the automobile with him at the time of the transaction. When asked by defendant's salesman whether or not he owned the Ford outright plaintiff disclosed that its purchase had been financed by a loop bank to which he was still indebted. The salesman verified this fact by calling the bank and indentifying the car by a general description.

Plaintiff and the salesman then executed a contract of conditional sale for the Buick. The order form, signed by plaintiff, and the dealer's work sheet refer to the car traded by plaintiff as a 1956 Ford Fairlane. Both documents indicate that plaintiff was allowed a trade-in credit of \$2,130.47 on the purchase price of the Buick. Plaintiff then drove away in the Buick.

On the following day he returned to defendant's



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place of business with a certified check for the amount of his remaining indebtedness on the Ford, which, under the contract, defendant had agreed to pay to the bank through which the purchase of the Ford had been financed. Defendant refused to accept the check and accused plaintiff of dishonesty in the exchange of automobiles. Plaintiff retained possession of the Buick and offered to make payments in the succeeding two months. Defendant refused to honor the contract and threatened to repossess the Buick. Plaintiff then brought this action seeking declaratory judgment. Defendant counterclaimed for damages incurred as a result of a misrepresentation by plaintiff of the year and model of the Ford. The case was tried by the court without a jury and judgment for \$500 was entered for defendant on the counterclaim. Plaintiff was ordered to pay that sum within ten days or surrender the Buick to defendant.

On appeal plaintiff urges that he is entitled to declaratory relief as prayed in his complaint. We concur with the finding below that the conduct of plaintiff in failing to correct defendant's designation of the year and model of the car traded amounted to a misrepresentation of fact. In

Christopherson v. Marhoefer, 233 Ill. App. 421, 426 (1924), this court said:

"A representation does not necessarily have to be either written or spoken. Actions often speak louder than words and are even more effective in the perpetration of fraudulent acts. Indeed, silence may, under some circumstances, amount to a representation, for which, if it is untrue and another relies upon it to his injury, the law will afford a remedy."

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While that case was factually quite different from the instant case we believe that the principle we have quoted governs here. The appraisal slip was made in the presence of plaintiff. Plaintiff then signed an order which designated the car traded as a 1956 Ford Fairlane. The failure of plaintiff to disclose that he had changed the exterior of the Ford when he knew that defendant's agents relied upon such changes in estimating the year and model of the automobile constitutes active fraud. The agents for the defendant were induced by plaintiff's conduct to credit plaintiff with a 1956 model trade-in. Under such circumstances, where the conduct of plaintiff was deliberate, plaintiff cannot assert as a defense the failure of defendant to exercise reasonable diligence and care. Roda v. Berko, 401 Ill. 335, 342 (1948); Pustelniak v. Vilimas, 352 Ill. 270, 276 (1933); Gilbey v. Hamlin, 297 Ill. 258, 263 (1921).

The answer of defendant to the complaint for declaratory judgment prays that judgment be entered in its favor in the amount of \$550. On direct examination the sales manager and vice-president of defendant testified that eight days after the trade he, his partner, and another attempted to effect a settlement with plaintiff. He testified that they requested plaintiff to pay them an additional \$550 which was the difference in value of the two types of Ford at wholesale. Plaintiff did not raise any issue as to this amount in the pleadings nor was there any attempt to contradict on cross-examination the amount alleged to be the difference in value between the two cars. In a case of

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actionable fraud the injury, as well as the other elements, must be proved to a reasonable degree of certainty. Struve v. Tatge, 285 Ill. 103, 109 (1918). The case was tried without a jury. On the basis of the record, the trial court could reasonably conclude that the allowance made to plaintiff for his old car would have been \$500 less if the true year and model of the car had been revealed.

There was, therefore, ample basis for finding for the counter-defendant in the amount of \$500. The judgment, however, provides that plaintiff shall pay money damages or surrender the Buick. There is no basis for this alternative judgment. We therefore affirm that part of the judgment awarding money damages in the sum of \$500 and reverse the alternative part of the judgment.

Judgment affirmed in part and
reversed in part.

McCormick, P. J., and Schwartz, J., concur.

Abstract only.

358 A

47274

HELEN SMITH,

Appellant,

v.

CITY OF CHICAGO, a municipal corporation,
READY COAL AND CONSTRUCTION COMPANY, a
corporation, and AUGUST SIEVERS SONS
COMPANY, a corporation,

Appellees.

18 I.A.^{2d} 543

APPEAL FROM

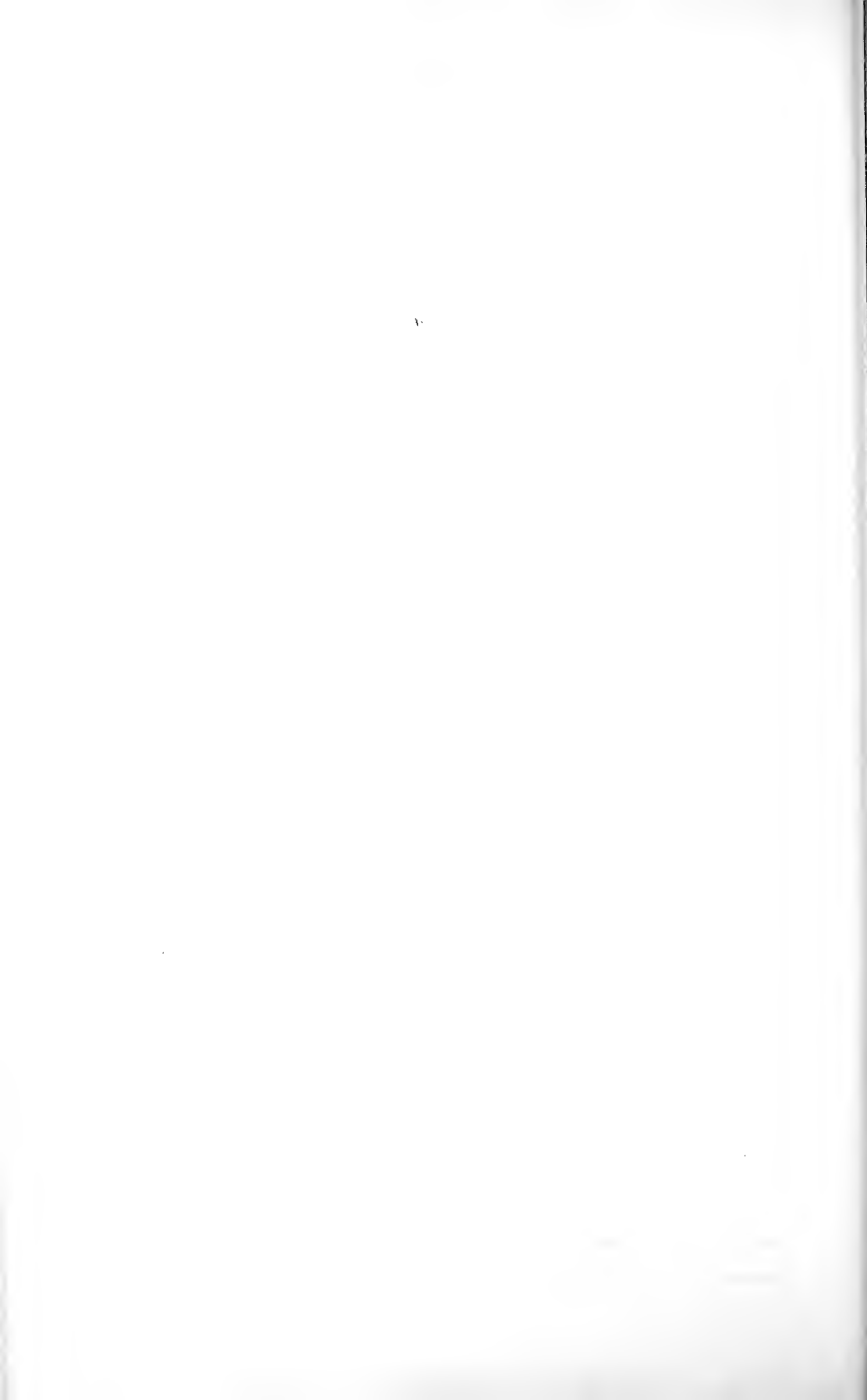
SUPERIOR COURT

COOK COUNTY

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover damages for personal injuries alleged to have been sustained by her while crossing 47th street in the west crosswalk area at that street's intersection with Indiana avenue in Chicago. The suit was based upon charges of negligence against the City of Chicago, Ready Coal and Construction Company, which had a contract with the city to repave the north side of 47th street for a distance of one mile east of State street, and August Sievers Sons Company, subcontractor doing the excavation work on the project. At the close of plaintiff's case the court sustained motions for directed verdicts, instructed the jury to find the defendants not guilty, and entered the adverse judgments from which plaintiff appeals.

It appears that on May 5, 1951, the day of the alleged injury, plaintiff, who is presently a resident of California, lived at 6217 Drexel avenue in Chicago, and was at that time employed by a book bindery at 1406 Indiana avenue. On the day in question, a Saturday, she left her place of employment about



-2-

1:00 p.m. to return home, taking a Michigan avenue bus south to 47th street, a transfer point. She walked east on 47th street, stopping to shop for groceries in a store located on the north side of 47th street near the intersection of Indiana avenue, and then, carrying her purse and a shopping bag, resumed walking east to the intersection of Indiana avenue (which is one block east of Michigan) to take an eastbound bus. From the northwest corner of that intersection she started to walk south across 47th street to board her bus. Two men were crossing 47th street, without any apparent difficulty, about three feet ahead of her. As she started to cross, plaintiff glanced to the ground and was, simultaneously, watching automobile traffic. She testified that prior to crossing she observed that 47th street at, and just to the west of the intersection, was under repair, with paving stones torn up and some lying in piles. The surface of the crosswalk area was loose soil. No men were working along the street at that time. When she reached a point about six feet from the north curb of 47th street, her foot came down upon a paving stone embedded in the soil and projecting about two to three inches above the surface; she tripped and fell to the ground. She testified that she did not see the stone before her foot contacted it. At the time she was wearing shoes in good repair, with one and a half inch heels. One Walter McCoy, who was deceased at the time of the trial, assisted her to her feet. She completed crossing to the south side of the intersection, waited for and then boarded an eastbound bus, and proceeded to South Park avenue, a distance of two or three blocks. There she alighted in

order to board a southbound bus, but before reaching the bus stop she became faint and fell to the ground. A passenger in a passing taxicab took her to her home, where she regained consciousness following intermittent periods of unconsciousness during the taxi ride. After two days of self-treatment, plaintiff visited Dr. Clarence E. Jamison, a physician, who testified that he took a history from plaintiff when she called at his office on May 7, 1951; and he stated that she told him that, while walking across the street to catch a bus at 47th street and South Park avenue, she turned her ankle. The doctor produced his original office record and testified that he had furnished plaintiff's counsel with all information on June 28, 1951. The words "47th and South Park" were interlineated in the history during the process of taking plaintiff's statement.

There were no occurrence witnesses other than plaintiff herself. Elsie Menter, called as a witness on plaintiff's behalf, was the passenger in the passing cab who befriended plaintiff. She had noticed plaintiff at the intersection of South Park avenue and 47th street walking with a limp, and stated that when plaintiff was just short of reaching the bus stop she fell. The cab driver and Mrs. Menter picked plaintiff up and took her to her home on Drexel avenue. After Dr. Jamison examined plaintiff on May seventh he referred her to a roentgenologist, who confirmed Dr. Jamison's diagnosis of a fracture; at the suggestion of plaintiff's foreman, she next consulted Dr. Berman, who treated her injury.



From the uncontroverted testimony it appears that the north side of 47th street, from Cottage Grove to State street, was being repaved during the year 1951. The city had contracted with Ready Coal and Construction Company, as a general contractor, for the improvement; August Sievers Sons Company was the sub-contractor taking care of the excavation. Cottage Grove is 800 east (of State street), South Park is 400 east, and Indiana avenue is 200 east. The excavation commenced on April 1, 1951 on South Park and was continued east to Cottage Grove; then work was started on South Park and moved west in a continuous operation to State street.

Otis A. Rogers, chief engineer of the department of streets and sanitation of the City of Chicago, called by plaintiff as an adverse witness, appeared under subpoena with the original plans of the job and the daily report sheets. He was in charge of construction work and had served in the department of streets for thirty-four years. From his records he testified that actual excavation was started at South Park avenue on April 18, 1951, continuing east to Cottage Grove avenue; that the intersection of 47th street and Indiana avenue was excavated on May 12, 1951, seven days after the alleged accident; that no work had been performed by any city representative or contractor in the immediate area of 47th and Indiana on or prior to May 5, 1951. Rogers visited 47th street every day during the excavation work and spent the entire day on the job.



Martin Bennema, office manager of defendant August Sievers Sons Company, also appeared as an adverse witness under subpoena and produced certain records of his employer. He stated positively that his company did not have any men working at 47th and Indiana on the day of the alleged accident. From work cards in his possession, he stated without contradiction that his company was not working in the area of 47th and Indiana on or prior to May 5, 1951.

In its motion for a directed verdict, counsel for Sievers Company called the court's attention to the fact that plaintiff had not produced any evidence that his company had done any excavating or other type of work at or near the intersection of 47th street and Indiana avenue prior to the accident, and that the witnesses Bennema and Rogers, both subpoenaed by plaintiff to appear with their records, testified without dispute that neither the Sievers Company nor the Ready Company had done any work at or near that intersection on or prior to May 5, 1951; rather, the affirmative proof was that Sievers Company was actually working at 47th and South Park on the day in question and was proceeding west toward Indiana avenue.

Plaintiff seems to take the position that, because the Sievers Company and the Ready Company were under contract to excavate at 47th street and Indiana avenue, and because she testified that 47th street on the west side of Indiana was under excavation on May 5, 1951, it must be presumed that defendants did the work at that time. There was no evidence to this effect.



In summary, and after a careful examination of the record, we find no proof offered on behalf of plaintiff that either Sievers Company or Ready Company, or the City of Chicago, had done any work which created the condition complained of by plaintiff; and, indeed, there is a question as to the specific intersection at which the alleged accident occurred.

With respect to the liability of the City of Chicago, it appears that the defective condition of the street which allegedly caused plaintiff's injury was of such a nature as to fall within the general rule requiring actual or constructive notice of that condition to the city in order that it be held liable for negligence. Plaintiff contends, however, that where a municipality causes work to be done upon its streets, it is bound to take notice of the character of the work being done, and the condition of the street--whether safe or unsafe--and that accordingly there is no necessity of proving notice to it of the condition, since the city caused the condition to exist. However, the evidence is to the effect that no work had been done at the site of the alleged accident on or prior to May 5, 1951. Plaintiff herself stated that she saw no one working there at the time. Although she was entitled to have her evidence viewed in the light most favorable to her, it was nevertheless incumbent on her to prove actual or constructive notice to the city of a defective or dangerous condition of the street; plaintiff failed to establish such proof.

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Accordingly we think the trial judge was correct in directing verdicts for all three defendants; therefore, the judgments of the Superior Court are affirmed.

JUDGMENTS AFFIRMED.

BRYANT and BURKE, JJ., Concur.

ABSTRACT ONLY.



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In the

APPELLATE COURT OF ILLINOIS

Fourth District

February Term, 1958

Cooltronic Corporation of America,)
)
Plaintiff-Appellee,)
)
vs.)
)
Lieb Bros., Inc.,)
)
Defendant-Appellant)

18 I.A.^{2d} 544

Appeal from Circuit Court
of St. Clair County,
Illinois.

Hon. Quentin Spivey, Trial Judge.

Scheineman, J.

This was a suit to ascertain the amount due the plaintiff on certain contracts for construction at Scott Air Force Base near Belleville. The defendant, Lieb Bros., Inc., was the prime contractor dealing with the United States, and after certain eliminations, its total contract involved about eight million dollars. The plaintiff, Cooltronic Corporation of America, was a sub-contractor for kitchen and dining room equipment, refrigeration, and related matters.

The principal question in the case was whether the original contract between plaintiff and defendant had been modified by a subsequent agreement of the parties. The suit was referred to a special master who heard voluminous evidence involving many figures, and many documents. His final report and account was not approved by the court. Exceptions were sustained and the court re-

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stated the account and gave judgment for plaintiff in the sum of \$138,354.84. The defendant has perfected this appeal.

To keep this opinion within reasonable length, it is not possible to set forth all of the documents, nor is it feasible to discuss in detail each of the more than thirty Points in plaintiff's brief. Therefore only a synopsis of the more important items will be set forth.

The background situation is not in dispute. Defendant's prime contract included the construction of 2 Mess Halls and a Readiness Building. It was also required to furnish a great amount of equipment, and to install it; also to install another list of equipment to be furnished by the government. For convenience in the wording of documents and correspondence, the two lists were called respectively, "contractor furnished equipment" and "government furnished equipment." The distinction is important in subsequent developments.

The defendant sublet to plaintiff the contract to furnish the "contractor furnished equipment" and all the installation work, at a contract price of \$53,400. The abstract shows this list with its sizes and specifications of the equipment, only a few items being designated by make and model, and these few were followed by the words "or equivalent." Many of the items were followed by the word "fabricated," which meant made to fit the job.

About the same time this contract was negotiated, the government decided to have defendant supply the other items called "government furnished equipment." In turn, the defendant sent to plaintiff a document labeled "Purchase Order No. 108," which named a price of \$48,300. The plaintiff wrote back that there were errors in the prices, and requested an increase of \$9794.54 to make a total of \$58,094.54. The request was complied with and a revised order was

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The scientific aspect of the problem is concerned with the question of how life arose from non-life. The philosophical aspect is concerned with the question of whether life is a necessary part of the universe or whether it is a mere accident.

The second part of the paper is devoted to a discussion of the various theories of the origin of life. It is shown that there are three main theories: the theory of spontaneous generation, the theory of biogenesis, and the theory of abiogenesis. The theory of spontaneous generation is the oldest and simplest, but it is also the least plausible. The theory of biogenesis is the most plausible, but it is also the most difficult to prove. The theory of abiogenesis is the most recent and most complex, but it is also the most promising.

The third part of the paper is devoted to a discussion of the evidence for the origin of life. It is shown that there is a great deal of evidence in favor of the theory of abiogenesis. This evidence includes the discovery of the first fossilized micro-organisms, the discovery of the first fossilized cells, and the discovery of the first fossilized organisms. It also includes the discovery of the first fossilized plants and animals.

The fourth part of the paper is devoted to a discussion of the implications of the origin of life. It is shown that the origin of life has important implications for our understanding of the universe. It shows that life is not a rare phenomenon, but a common one. It also shows that life is a necessary part of the universe, and not a mere accident.

sent labeled order No. 108-SF naming the asked price for the same list of equipment. This order clearly designates the list as "Government Furnished Equipment." Plaintiff accepted the revised order.

Although this order is also a "contract," it was not commonly referred to as such. There has been an attempt by defendant to merge the two, but the distinction is plain in all the testimony, including that of defendant's president. We quote briefly from his testimony as to order No. 108-SF. "That had nothing to do with the contractor-furnished equipment. The purchase order authorized Cooltronic to furnish the government-furnished equipment which was received from Lieb Bros. There is no argument that Cooltronic was to be paid under the purchase order the amount of \$58,094.54. The contractor-furnished equipment was provided for under a different document * * * I probably referred to the contract and the purchase order with Cooltronic as one package but the contract in itself was a basic contract * * *".

This is what plaintiff is claiming, and what the court found; and the documentary evidence supports that claim. Accordingly we find as a fact that plaintiff's claim of \$58,094.54 is for government furnished equipment alone and has nothing to do with its other contract.

As to the claim that the original contract for contractor furnished equipment was modified by a subsequent agreement, the oral testimony is conflicting. Plaintiff's testimony is that the government changed its requirements as to items on the list from general specifications to specific make and model items, produced by other companies, and that this would greatly increase its cost. This seems reasonable, for if plaintiff had to buy from rival companies, instead of

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using its own plants, it would be paying for other overhead and profit than its own.

Plaintiff's officials testify: that they objected to the change and informed defendant that they could not proceed on that basis; that defendant's officials were anxious to proceed without delay; that defendant's Project Manager told plaintiff that Mr. Lieb had said he would allow to plaintiff the amount estimated for this contract in its original bid with the government; that this would naturally be a larger amount, since defendant would expect its profit in that part of the job; that a representative, named Ballard, was sent by plaintiff to interview Mr. Lieb (defendant's president) at Newark, and Mr. Lieb made the promise as stated by the Project Manager; that he was asked how much these estimates were and Mr. Lieb said the figures were in possession of the Project Manager; that the latter was asked for the data, and it was furnished in a letter; that the figures (hereafter stated) were much higher than the contract; that the Project Manager confirmed the promised increase by a letter urging reliance upon Mr. Lieb; that plaintiff has furnished all that the government required and the work has been accepted but not paid for.

Defendant's testimony is that there were not many increases in cost by reason of specifying make and model items in the contract, that Mr. Lieb was referring in his promises only to the purchase order, and that the increase allowed on that order was to settle the claim on the contract as well as the purchase order. Finally, that the figures in the letter were not the allowances for this work by the government. No other figures were put in evidence by defendant, there being apparently an intent to deny they existed, although the testimony is not clear on this and there are also discrepancies.

The documentary evidence supports plaintiff and negatives the testimony of defendant. Since there were two deals between these parties at the same time, some letters make reference both to the contract and the purchase order, but always as though they were distinct. There is not the slightest indication that the two were ever treated as merged or settled by one sum.

The "contract" was dated January 5, 1952, although there is some dispute as to that being the date it was actually executed. The first purchase order was dated also January 5th, and the revised order bears the same date, although it must have been sent at a later date. There is some indication that the purchase orders were executed much later, there being a letter from defendant dated January 23rd which still refers to the order as being for \$48,300 whereas there is no dispute that this was changed.

There is a letter from the Project Manager to plaintiff dated January 8th enclosing a letter from the Corps of Engineers, and the last paragraph contains this caveat: "This letter in no way alters purchase order or contract given you."

Next there is the letter dated January 10th which furnishes the figures in dispute. The essential paragraph is here quoted to show that it is referring only to contractor furnished equipment and installation, not to any purchase order of government equipment, and that the figures are limited to the named items and do not purport to include anything else, as claimed in defendant's oral testimony.

"You asked about our allowance in estimate for each Mess Hall. We used an amount of \$65,800.00 for each Mess Hall for the contractor furnished equipment installed with labor for installing Government furnished equipment, and \$30,000 for the food service

The first part of the paper discusses the importance of the study of the history of the United States. It is argued that a knowledge of the past is essential for a full understanding of the present. The author then proceeds to a detailed examination of the various factors which have shaped the development of the United States. These factors include the influence of the European settlers, the role of the Native Americans, and the impact of the American Revolution. The author also discusses the role of the United States in the world, and the challenges it faces in the future. The paper concludes with a summary of the main points discussed and a final statement on the importance of the study of the history of the United States.

equipment, including snack bar for Readiness Building."

In a letter from the Project Manager to plaintiff dated January 25, 1952, the first paragraph refers to the purchase order and merely states that the Corps of Engineers expects the items "at an increase in our contract price." As to the contract, the letter proceeds:

"You advised that you could not furnish the items in your contract in the trade makes as already submitted for approval by this office to the Corps of Engineers at the contract price. I believe they are insisting on us furnishing the specific manufacturer and model number as approved. Contrary to the usual practice they are requiring the items be furnished that have been approved and no other items will be accepted as equal or in substitution. * * * I do not believe you need be concerned about Mr. David Lieb adjusting your contract and the purchase order, as I was in our Newark Office when your representative, Mr. Ezra Ballard, called and talked to Mr. Lieb and Mr. Lieb told him that you should furnish what the government required and that he would allow you exactly what he was receiving from them." The letter concludes with an assurance that plaintiff could rely upon Mr. Lieb.

The writer of this letter admitted writing and signing it, but his oral testimony seeks to contradict almost everything in it. As to the reference in the letter that trade makes had been submitted for approval "by this office," he denies that his office or his company had ever submitted any trade makes for approval. He asserted flatly that "The Corps of Engineers did not insist on certain manufacture or certain brands of equipment," although his letter indicates they were doing so "contrary to custom." He denies that he was present in the

Newark office at the conversation between Mr. Ballard and Mr. Lieb. He could not recall that plaintiff had ever informed him it could not furnish under its contract the make and models demanded. When his attention was called to the statement in the letter specifically admitting that he had been so advised, his answer was so evasive that he was admonished by the Special Master to make his answers responsive. The admonition had no effect and the question never was answered.

As for the promise that plaintiff would be allowed exactly what defendant received from the government (which Mr. Lieb said he could not explain because he had not written the letter) this witness had much to say. Boiled down, his testimony indicates the words mean precisely what they purport to say. They import that the defendant would receive more from the government than the amount of the sub-contract, because a general contractor would naturally expect to make a profit on that item. In spite of the evasions and contradictions, the promise is not denied, that this larger amount would be allowed to plaintiff.

One defense asserted is that the promise had been fulfilled, or at least had been compromised and a settlement agreed upon. The witness bases this claim on a reference to the purchase order and contract as a package, and on the fact that the price in the purchase order for government furnished equipment had been increased by the change of \$9794.54. He does not claim that the resulting total was what the government allowed for this equipment. On the contrary he asserts that the total was some \$600 more than the government allowed for this list. And, at another place in his testimony he admits that the amount of \$58,094.54 "was the price that the defendant had finally agreed to pay the plaintiff for the government furnished equipment" being the

items in purchase order No. 108-SF. We have previously quoted the testimony of defendant's president that this figure is for government furnished equipment, that there is no dispute about it, and that the contract for contractor furnished equipment was a separate deal even though the two may have been referred to as a "package" when the same party had both deals.

This testimony on defense that the change of \$9794.54 in the purchase order was a complete settlement of a claim on the promise as to the other contract for material and labor, must be compared with the documents in evidence. The purchase order bears on page one an identification number as follows: #DA-11-032 ENG 1232. The first draft of this purchase order was sent by defendant to plaintiff with the same identification number at the top of the letter. It names the price of \$48,300.00 for government furnished equipment and adds "This does not include that equipment covered by contract with you." The plaintiff replied by letter with the same number at the top, asserted errors in the "above" to the amount of \$9794.54 and requested a change order of that amount. It is clearly a request for the increase in the amount of the order for government furnished equipment.

Thereafter the defendant sent to plaintiff a revised purchase order, bearing the same identification number as before, with the price increased as requested, making the new total in the sum of \$58,094.54. This order is marked "Accepted" over plaintiff's signature. It is the final agreement on government furnished equipment, signed by both parties and certified by an officer of the Corps of Engineers. It contains an itemized list of material, and allocates the purchase price as follows:

Government Furnished Kitchen Equipment,

complete 1-800 Man Mess Building	\$27,150.00
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Government Furnished Kitchen Equipment,

complete 1-500 Man Mess Building	\$27,150.00
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Government Furnished Kitchen Equipment,

complete 1-Readiness Building	\$ 3 ,794.54
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	\$58,094.54
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The only reference in this document to the other contract for contractor furnished equipment is on an insert pasted in, which reads "Terms: To conform with contract entered into January 5, 1952." The terms, that is, the percentage payments during construction up to final completion, had differed from the other contract, and plaintiff wrote a letter, which is in evidence, requesting they be made the same. Pursuant thereto, this insert was pasted over the original terms and initialed by the two signers. We can find nothing in this or in any part of the purchase order purporting to allot any part of the stated price to the other contract for contractor furnished equipment, or to any supposed settlement thereof. The entire amount is plainly allotted to government furnished equipment in three buildings.

It is our opinion, and we so find, that the oral assertion that part of the price for government furnished equipment was applicable to contractor furnished equipment, is completely refuted by documents in evidence.

The stated price in the contract added to the stated price in the purchase order makes a total of approximately \$112,000. In a letter from plaintiff to defendant reference is made to this total as the contract price. The defendant argues that this is an admission there was no agreement to change the contract, as this letter is dated about a

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year later. The whole of the letter is a complaint about slowness of payments and failure to keep promises made by defendant, and concludes with a demand for a definite understanding for extra remuneration "as promised." Instead of being an admission that there was no change in the first contract, the letter is a claim that extra compensation was promised. In our opinion the letter also indicates a willingness on the part of plaintiff to discuss a settlement of the promised amount, rather than sue on the precise promise as made.

One of the points of law made by the defense is that proof of a modification of a contract, by a later agreement, must be strong and clear. *Robar v. Isham*, 310 Ill. 585, 589. The written acknowledgement of the oral promise, over the signature of defendant's officer in charge of the job, meets this requirement.

A promise to pay compensation in addition to that specified in the contract without consideration to support it, is not binding on the promisor, *Smith v. Gray*, 316 Ill. 488, 496. In this case the plaintiff consented to depart from the contract and to buy and install more expensive equipment than called for in its contract, which it did. This is the consideration for defendant's promise to pay plaintiff a greater price. *C. & E.I. R.R. vs. Moran*, 187 Ill. 316; *Stubbings v. World's Columbian Exposition Co.*, 110 Ill. App. 210, 220.

Since the original contract was modified by subsequent agreement, for adequate consideration, the law required plaintiff to base its suit on the contract as modified and not on the original agreement. *Noll Co. v. Sparks Milling Co.*, 304 Ill. App. 624, 26 NE 2d 425. The defense strategy of denials and evasions has forced the plaintiff to proceed on the contract precisely as made, which it could prove, even though the plaintiff was willing to settle for less.

The first part of the paper discusses the importance of the study and the objectives of the research. It also outlines the methodology used in the study and the results obtained. The second part of the paper discusses the findings of the study and the implications of the results. It also discusses the limitations of the study and the need for further research. The third part of the paper discusses the conclusions of the study and the recommendations for future research. It also discusses the significance of the study and the contribution it makes to the field of research.

The study was conducted in a laboratory setting and involved the use of a variety of equipment and materials. The results of the study were analyzed using statistical methods and the findings were compared with those of previous studies. The study found that there were significant differences between the groups and that the results were consistent with the hypotheses. The implications of the results are discussed in detail and the need for further research is emphasized. The study also has some limitations and the need for further research is discussed. The conclusions of the study are discussed and the recommendations for future research are given. The significance of the study and the contribution it makes to the field of research are also discussed.

The study was conducted in a laboratory setting and involved the use of a variety of equipment and materials. The results of the study were analyzed using statistical methods and the findings were compared with those of previous studies. The study found that there were significant differences between the groups and that the results were consistent with the hypotheses. The implications of the results are discussed in detail and the need for further research is emphasized. The study also has some limitations and the need for further research is discussed. The conclusions of the study are discussed and the recommendations for future research are given. The significance of the study and the contribution it makes to the field of research are also discussed.

The defendant also claims that bankruptcy proceedings against it had the effect of depriving the state court of jurisdiction to proceed with this case. These proceedings were in an eastern federal court. It does not appear that they were called to the attention of the trial court at any time during the hearings before the master or the circuit court. The first mention of it is in a motion filed by defendant after judgment. This point and numerous other points raised by defendant have been fully considered by this court. They are completely and effectively disposed of by plaintiff-appellee's brief, and will not be further discussed herein.

There is some argument to the effect that the plaintiff did not prove the amount of defendant's estimates and allowances in its contract with the government, since that contract with its schedules of costs was not produced. We find no merit in this contention. The plaintiff was not a party to that contract and would not be likely to have an executed copy, while the defendant would have. But the plaintiff had the admission from defendant as to the amounts of those estimates and allowances in question. This was in the form of a letter from defendant signed by the officer in charge of the job, to whom plaintiff had been referred by defendant's president as the man who would have the information. Admissions are competent proof, admissible as original or substantive evidence of the truth of the statements made. I. L. P. Evidence, Sec. 131; Cleary, Handbook of Illinois Evidence, p. 162. We find that plaintiff has proved by the weight of the evidence all the necessary elements of the modified agreement sued upon.

There were three items of "extras" allowed to plaintiff. The defendant objects that they were not supported by a written order from defendant, as the contract required. The first of these

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bi-weekly. The annual

was a change order from the government allowing an increase of \$805.12 for specified additions to the purchase order. It is not disputed that plaintiff supplied the parts and sent an invoice to defendant for the stated amount. The defendant never made any protest that it had not issued its own written change order. The second is an invoice for change from water coolers to drinking fountains at \$1236. Again the defendant made no requirement of a written order from it. An employee of defendant marked the invoice "extra to contract" but the defense asserted this was a mistake of its bookkeeper. The third was for \$1293.91 for cutting through finished walls and supplying copper tubing to connect some refrigeration at a distance. In our opinion these invoices for extra work done or additional material furnished come within the rule that the contract provision for a written order to support them has been waived. *Theis v. Svo'boda*, 166 Ill. App. 20.

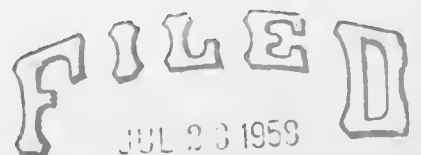
The trial court allowed to defendant numerous credits against plaintiff's account, including one for expenses of handling and storage, which defendant claimed, because plaintiff was too prompt with deliveries, and they had to be put aside for a time. The plaintiff has not contested these items in this court.

The accounting found by the court and for which a money judgment was entered is according to the law and the evidence, and the judgment is affirmed.

Judgment Affirmed

Bardens, P. J., and Culbertson, J. concur.

Publish Abstract Only.



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18 I.A.^{2d} 545

General No. 11150

Agenda No. 2

IN THE
APPELLATE COURT OF ILLINOIS
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SECOND DISTRICT-FIRST DIVISION
-- --
May Term, A.D., 1958.

GEORGIANN SEDIVY, ANTHONY SEDIVY,
NANCY LEE SEDIVY, a minor,
JOAN MARIE SEDIVY, a minor,
by ANTHONY SEDIVY, next of
friend, and CORA MAE PHILLIPS,
a minor, by M. D. PHILLIPS,
next of friend,

Plaintiffs-Appellants,

vs.

RICHARD RIDLEY and WILLIAM G. RIDLEY,

Defendants-Appellees.

APPEAL FROM THE
CIRCUIT COURT OF
DU PAGE COUNTY.

788 300
AUG 1958
PAUL V. WUNDER
Clerk Appellate Court Second District

DOVE, F. J.

This is an action brought to recover damages for personal injuries resulting from an automobile accident. The plaintiffs are Georgiann Sedivy and Anthony Sedivy, her husband, and Nancy Lee Sedivy, two years old, and Joan Marie Sedivy, five years old, their minor children, and Cora Mae Phillips, age six, a niece. The defendants are Richard Ridley, age 17, and his father, William G. Ridley.

The issues made by the pleadings were submitted to a jury and at the conclusion of the evidence the court directed a verdict in favor of William G. Ridley, who was the owner of the car which his son was driving. As to the defendant, Richard Ridley, the jury returned a verdict finding

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him not guilty as to the claim of each of the plaintiffs. Judgments were rendered upon the verdicts and plaintiffs' post-trial motion for judgment notwithstanding the verdict and for a new trial as to defendant, Richard Ridley, was denied and plaintiffs appeal.

The complaint, in addition to alleging that the defendant, Richard Ridley, operated his car, upon the occasion in question, carelessly, negligently and improperly, specifically charged that he operated his motor vehicle (a) without keeping a sufficient lookout ahead; (b) without sufficient brakes, contrary to the statute; (c) at a high and unreasonable rate of speed at the intersection of Route 83 and 31st Street; (d) failed to avert injury to the plaintiffs after discovering the perilous position in which they had placed themselves prior to the accident; and (e) that he failed to give warning signals. The defendant, by his answer, denied all of these charges.

The record discloses that about six o'clock on the evening of May 29, 1955, the plaintiff, Georgiann Sedivy, was driving her husband's ^{1948 Chrysler} car west on 31st Street, which is a two-lane, blacktop road, between eighteen and twenty feet in width. She had traveled this street frequently for about eleven years. Route 83 is a through highway with two lanes going south and two lanes going north, with a 20-foot graveled parkway separating the north and south bound traffic lanes. There is a stop sign on 31st Street at its intersection with Route 83 and this stop sign is located about twenty-five feet from the east edge of Route 83. Riding with her in the front seat was her husband, the plaintiff, Anthony Sedivy, and riding

in the rear seat were the three minor plaintiffs. She testified that she came to a stop at the stop sign and looked in both directions and noted that the southbound traffic was quite heavy, but did not see anything going north after a few cars had passed, so she proceeded to cross the north-bound lane of Route 83, going three or four miles per hour and moved into the parkway separating the lanes of traffic where she again stopped. According to this plaintiff's testimony, it was while she was stopped in the parkway waiting for the south-bound lanes of traffic on Route 83 to clear that the defendant's car, going north on Route 83, swerved in such a manner as to hit the car she was driving while it was stopped in the parkway. On cross-examination, she testified that when she stopped at the stop sign before entering Route 83, she noticed two north-bound cars down the road about four hundred yards and she waited until they passed before attempting to cross. She stated she did not see the defendant's car come in contact with the car she was driving, although she looked to the south a second or two before, but was looking north at the moment of impact. She stated that her car might have been a foot or two on the inner north-bound lane of Route 83 rather than being entirely within the parkway and that when she crossed the north-bound lane of Route 83 to the parkway she sort of "swooped" across this lane. The car she was driving was struck almost in the center of its left side.

The plaintiff, Anthony Sedivy, also testified as to how the accident occurred and stated that his wife stopped the stop sign at Route 83; that she made a complete stop and then proceeded slowly across the north-bound lane of

[illegible]

Route 83 to what he called "the island" (the graveled space dividing the north and southbound lanes of the through highway); that he was familiar with Route 83 and that there is no speed limit on Route 83 at its intersection with 31st Street; that when his wife stopped the car on the parkway, possibly a very little of it still remained on the inner north-bound lane of Route 83 but he doubted it; that during the time they were stopped in the parkway he conversed with his wife; that when his wife stopped at the stop sign before crossing the north-bound lane of Route 83, he looked to his right, which was to the north, and saw considerable traffic going south in the south-bound lane; then he looked to his left, the south, and saw nothing coming; that when they were stopped at the island he heard a screeching of brakes on his left, the south, and turned his head in that direction and saw the defendant's car about fifty or sixty feet from him, sliding sideways toward his car; that he had not seen the car before, although he had looked in that direction at the time his wife started across the northbound lane of Route 83; that after the accident he saw some skid marks to the south for a distance of about one hundred twenty-five to one hundred fifty feet; that these skid marks were in the inner north-bound lane of Route 83 and that they led up to the place where his car had stopped; that all of these marks were not in the inner north-bound lane but curved off and led into the parkway where he stated his wife had stopped the car. Other than the medical testimony, the only evidence produced by plaintiffs at the trial was that of Mr. and Mrs. Sedivy and the pictures, which do not appear in the abstract, but which we have examined from the record.

[illegible]

The defendant testified in his own behalf and stated that at the time in question he was proceeding in the north-bound lane of Route 83 toward the 31st Street intersection and that he was about one hundred feet from the intersection when he first saw the Chrysler car occupied by the plaintiffs and at that time it was very close to the stop sign protecting Route 83; that the Chrysler was moving in a westerly direction; that he then looked away from it for a second and the next thing he saw was plaintiffs' car right in front of him, about twenty-five to thirty feet away, in the inner north-bound lane; that he took his foot off of the gas, but did not put his brakes on because he did not have time; that the impact between his car and the car in which the plaintiffs were riding occurred in the inner north-bound lane; that the right front of his car came into contact with the left center of the Chrysler. He further stated that no part of the Sediv car was in the parkway at the time of the impact and that the highest rate of speed he attained on Route 83 that afternoon was fifty-five miles per hour.

Riding with the defendant, Richard Ridley, at the time of the accident was his friend, Peter Remedi. Mr. Remedi testified in behalf of the defendant and stated he was nineteen years of age at the time of the accident and twenty-one at the time of the trial; that on the day of the accident the defendant was driving a 1955 Ford Hardtop car, which belonged to the defendant's father; that about four o'clock on the afternoon of that day defendant, Richard Ridley, picked him up at his home and they drove around for awhile and visited with some friends and then decided to go north on Route 83

to the Sky-Hi Drive-In Theater to see what movie was on that night; that for several hundred yards south of the intersection of Route 83 and 31st Street, the defendant was driving his car in the outside lane traveling about fifty-five to sixty miles an hour; that he passed a truck going north and drove from the point at which he passed the truck in the inner north-bound lane but that they did not gain on the traffic that was ahead of them; that when the defendant passed the truck he was going about sixty miles an hour; that the first time he saw the car in which the plaintiffs were riding he was about seventy-five feet south of the intersection; that at that time they were traveling in the inside lane and the plaintiffs' automobile was just entering Route 83; that the front wheels of the plaintiffs' car, when he first saw it, were on the outside lane of Route 83 and that the plaintiffs' car kept on moving.

This witness further testified that he did not actually see the collision; that the last thing he remembered was "Dick (the defendant) swerving the steering wheel. At that time we were right on top of the other car. The other car was then in the center of the inside lane; I did not, at the time as I came up to the intersection of Route 83 and 31st Street, see an automobile stopped on the island between the north and the south-bound lanes; I cannot tell you the speed of this other vehicle as it crossed Route 83; I don't believe that the brakes were applied on the car I was riding in prior to the accident. The next thing I knew was I woke up in the hospital."

William G. Ridley, father of defendant, Richard Ridley, and Mrs. William G. Ridley, his mother, testified that in a conversation with plaintiff, Anthony Sedivy, at the hospital the evening of the accident, Dr. Sedivy told them that he did not know how the accident happened.

The foregoing is a fair resume of the evidence found in this record. It discloses the questions of fact which were presented to the jury for it to resolve.

Plaintiffs contend that the admissions of the defendant that he did not put on his brakes immediately prior to the collision and that a few seconds prior to the collision he swerved to his left, instead of to his right, so as to pass behind the plaintiffs and thus avoid striking the car in which they were riding, show that he is guilty of negligence as a matter of law. We do not think so. The jury had a right to take into consideration the circumstances in which he was placed in determining the question of fact whether he was guilty of negligence which proximately contributed to cause this collision. "It is obvious," said the court in *Roberts v. Chicago City Ry. Co.*, 262 Ill. 228, at page 233, "that persons placed in a position of peril, where a course of conduct must be determined without any time in which to deliberate, cannot be judged by the same rule applicable where there is ample time to determine what course to take to avoid danger. If the course pursued appears, in the light of the circumstances, to be such as would be adopted by reasonably prudent persons placed in the same situation, the law declares that there has been no want of care."

The jury evidently believed the defendant's version of what transpired just before and at the time of the collision. It was warranted in concluding that the plaintiffs' car was in the inner north-bound lane of Route 83 and not in the parkway between the two lanes at the time of the actual impact. The testimony of Mr. and Mrs. Sedivy that the driver of their car had stopped and that their car was resting in the graveled parkway separating the two lanes of Route 83 and that the defendant became confused and his car swerved off of the traveled portion of Route 83 and struck the car of the plaintiffs in the parkway is a somewhat improbable story and did not convince the jury that those were the facts. Where the evidence is conflicting, it is not the province of the reviewing court to substitute its judgment for that of the jury, and where disputed questions of fact are presented to a jury and the jury passes upon them, unless palpably erroneous, the finding of fact will not be disturbed by the reviewing court. (Griggs v. Clauson, 6 Ill. App. 2d 412, 419; Meyer v. Williams, 15 Ill. App. 2d 513, 523; People v. Hanisch, 361 Ill. 425, 458.)

It is also argued that the four plaintiffs, other than the driver of the car, Georgiann Sedivy, and particularly the three minor plaintiffs who were riding in the rear seat of the plaintiffs' automobile, were clearly not shown to have been guilty of any contributory negligence. This might well be so. The jury, however, may have concluded that the sole proximate cause of the accident was the negligence of the plaintiff who was driving the automobile. If such was the case, then whether the other plaintiffs were guilty of contributory negligence or not would be of no consequence. The evidence

[illegible]

of the defendant and his witnesses tended to prove that Georgiann Sedivy was negligent in attempting to drive the car across Route 83 under the circumstances existing just before and at the time of the collision. If the jury accepted their version of how the collision occurred, they concluded that Mrs. Sedivy drove her car in front of the defendant's car when a reasonable person, in attempting to cross Route 83 under the circumstances then existing, would not have done so, and that her conduct was the proximate cause of the accident.

The jury was not required to believe the plaintiffs' version of the accident, and the jury's verdict indicates that it did not do so. Based on the evidence in this record, we would not be warranted in saying that the jury could not have reasonably believed that the conduct of the driver of the car, Georgiann Sedivy, was the sole proximate cause of the collision. The facts and circumstances introduced in evidence and the reasonable inferences to be drawn therefrom, in our opinion, warranted the verdict in this case. (Illinois Central R.R. Co. v. Gillis, 68 Ill. 317, 319; Chevalier v. Seager, 121 Ill. 584; Carney v. Sheedy, 295 Ill. 78.)

It was contended by plaintiffs, in their post-trial motion, that the jury misapprehended the law which was applicable to the evidence presented to it. In support of their contention the trial court heard, over the objection of the defendant, the testimony of Alfred B. Benziger, the foreman of the petit jury. Mr. Benziger testified that the jury drew up a memorandum which stated: "We, the jury, according to the instructions given us, have no alternative but to find the defendant, Richard Ridley, not guilty." This party further testified that he showed

this memorandum, shortly after the verdict was returned and after the jury had been discharged, to one of defendant's attorneys. This witness was then asked by counsel for defendant: "In your consideration, did you consider the negligence of individuals?" and the answer was: "The negligence figures in on this was the over-all picture of the two cars involved in the collision." He was then asked: "Did you deliberate as to whether the passengers were in any way negligent?" and his answer was: "No."

It has long been the established law in this state that the testimony of a juror will not be received for the purpose of impeaching or setting aside the verdict of the jury of which he was a member. (Reed v. Thompson, 88 Ill. 245, 247; Guiter v. Knudson, 518 Ill. App. 411 at 213.)

There is no reversible error in this record and the evidence supports the verdict, and the judgment rendered thereon is affirmed.

Judgment affirmed.

McNeal, J. concurs

Spivey, J. concurs

• *Journal of the American Medical Association*, 1997; 277: 1001-1005

McMIST, J. C.

Spivey, J. Conrad

376 A

No. 1114

Public abstract only

Acenda 4

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, SECOND DIVISION

WY TERM, A. D. 1935

THE PEOPLE OF THE STATE OF
ILLINOIS, on the relation of JOHN
L. POOLE, State's Attorney in and
for Whiteside County, Illinois,

Plaintiff-Appellant,

vs.

GWENDOLYN TUCKER,

Defendant-Appellee.

191 A 546
Appeal from
Circuit Court of
Whiteside County.

CROW -- P.J.

On relation of the State's Attorney, a complaint was filed in the Circuit Court of Whiteside County alleging that a certain dwelling house owned by the defendant, Gwendolyn Tucker, is used for prostitution and constitutes a public nuisance under the provisions of the act of 1915 providing for suppression thereof. (Ill. Rev. Stat. 1935, Chap. 100 1/2) Defendant filed an answer denying the allegations of the complaint. After hearing the evidence the court entered a decree as prayed in the complaint, enjoining the defendant from maintaining a house of prostitution anywhere within the jurisdiction of the court, enjoining all persons from using the

NOV 1961

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0822181

THE PEOPLE OF THE CITY OF
ALBANY, in the County of
ALBANY, State of New York,
do hereby certify that

described house for any purpose for a period of one year, and directing a sale of all the fixtures and movable property in the house. The court thereafter denied a motion to vacate the decree; the defendant then appealed directly to the Illinois Supreme Court, apparently in the belief that a constitutional question was involved. The Supreme Court, (The People ex rel. John L. Poole, State's Attorney, v. Gwendolyn Tucker, Docket No. 34512, Agenda 37, September 1957), held there was no constitutional question involved and that it was without jurisdiction to consider the case on direct appeal. The cause was therefore transferred to this court.

In addition to the constitutional question, which will not and cannot be passed upon by us, the defendant contends that the trial court committed error in the following respects: That the proceeding was not brought in the proper name of the party plaintiff and that the complaint was insufficient. That the court had no power or authority to permit a private attorney to appear for the plaintiff. That incompetent evidence was admitted and that the evidence was insufficient. That the amendment of the complaint should not have been permitted. That the decree was insufficient and that the defendant did not have a fair trial.

The statute, *supra*, under which this action was brought requires that such proceeding be brought in the name of the people of the State of Illinois. Such name appears in the

was therefore prepared to call a halt.

Instructions to consider the case were given. The case

no consideration was given to the fact that the

Board of Directors, after a long and arduous

and, from a legal point of view, a complete failure.

question was referred to the Board of Directors.

Superior Court, especially in the case of a corporation.

dearly the distinction from other cases, in the following

the Board. The Board of Directors is the only body that

directing a sale of all the assets and the proceeds to

distributed to the stockholders for a period of one year.

It is further stated that the defendant was not present at the trial and that the jury was not sworn. The court also stated that the defendant was not present at the trial and that the jury was not sworn. The court also stated that the defendant was not present at the trial and that the jury was not sworn.

The enclosed report, which will be forwarded to you by the Bureau of the Census, contains information regarding the results of the survey of the economic conditions of the United States in 1934. The report is being prepared for the Bureau of the Census and will be made available to the public in the near future.

caption, but does not appear in the body of the complaint. The State's Attorney is described in the body of the complaint as the Relator and it is elementary that a Relator is complaining on behalf of someone other than himself. To determine on whose behalf the Relator is complaining, it is necessary only to look at the caption of the complaint. While it is better practice that the name of the People of the State of Illinois should have appeared in the body of the complaint, yet there was no motion made on this point until after the trial. This is a technical objection to the complaint which should have been raised by motion prior to the answer of the defendant being filed. Sec. 43, chap. 110, Ill. Rev. Stat., 1955, provides: "All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of,"

The defendant alleges various reasons why the complaint is insufficient and does not state a cause of action. These objections were waived by the defendant by his failure to file a motion attacking the complaint and the filing of his answer in the trial court and cannot be raised for the first time on appeal.

The defendant next contends that the trial court had no power or authority to permit a private attorney to assist the State's Attorney. We find no merit in this contention. Whether or not a private attorney assisted the State's Attorney

[illegible]

in this case was a matter which rested in the sound discretion of the trial court and there is no showing that this discretion has been abused. This rule was recognized in *People v. Kingstury*, 353 Ill. 11, 17, 186 N.E. 471, 472-473, wherein it was stated:

"Whether an attorney who volunteers his services or is employed by private individuals should be permitted to assist the State's Attorney in the prosecution of a criminal case rests largely in the discretion of the trial judge, to be decided according to the particular facts and situation in each case,"

To the same effect see *People v. Hartenbower*, 283 Ill. 591, 119 N. E. 605. Both of the cited cases were criminal cases and the appearance of a private attorney in a civil proceeding with the State's Attorney would be even more innocuous.

Defendant next urges that incompetent evidence was admitted and that the testimony admitted in evidence was insufficient to support the decree. It would not aid in the determination of this cause to recite the evidence which was objected to and the evidence admitted. Suffice to say, we have carefully reviewed the record before us and find that the court committed no reversible error in the admission of evidence. There was more than ample evidence to support the decree.

The original complaint herein designated the defendant as the "owner" of the house in question. The evidence revealed that the defendant was not the owner of the house but that she

was buying it on a contract and was in fact the occupant. By leave of court the complaint was amended by adding the one word "occupant." No objection was made to this amendment at the time it was made and the decree entered. We do not find any error in the allowance of this amendment, in fact such amendments are contemplated by and provided for in sec. 46 (3), chap. 110, Ill. Rev. Stat., 1955: "A pleading may be amended at any time before, or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just."

The defendant lastly urges that the decree entered in the trial court was insufficient for the reasons that no jurisdictional facts are recited in the decree, that there are no findings of fact to support the decree, that the decree was contrary to the law and evidence and the order of abatement was void. There is no merit in these contentions. The recital of jurisdictional facts in the decree is not essential. Chap. 110, sec. 64, Ill. Rev. Stat., 1955, provides specifically that it is not essential that there be findings of fact to support the decree. The decree was not contrary to the law and the evidence. On the contrary, it was amply supported by the law and the evidence adduced. The order of abatement is specifically provided for in the statute under which this action was brought, sec. 5 of chap. 100½, Ill. Rev. Stat., 1955, provides in part as follows:

[illegible]

"An order of abatement shall also issue as a part of such decree, which order shall direct the sheriff of the county to remove from such building or apartment, or such place all fixtures and movable property used in conducting or aiding or abetting such nuisance,....."

The defendant also urges that there was no evidence offered to show that the fee allowed the Sheriff for closing the house and keeping same closed in the amount of \$100.00, to be taxed as costs, was a reasonable fee. It is apparent from the record that no evidence was offered on the question of the reasonableness of the fee allowed the Sheriff. There is nothing in the record which discloses that the defendant at any time asked to be heard on the question of the fee to be allowed the Sheriff, and there is no requirement in the statute that the court take evidence on this question. We conclude that the fixing of the Sheriff's fee was in the sound discretion of the trial court and the trial court did not abuse its discretion in fixing the fee.

For the reasons herein set forth the decree entered on March 11, 1957, in the Circuit Court of Whiteside County, and the order entered on April 1, 1957, denying the motion to vacate, are affirmed.

DECREE AND ORDER AFFIRMED.

Wright, J. Concur

SOLFISBURG, J. Concurs

On order of the court, the following
is a copy of the report of the
commissioner of the State Police
dated at New York, New York, on
the 11th day of March, 1934.

The following is a copy of the report
of the commissioner of the State Police
dated at New York, New York, on the
11th day of March, 1934, in relation
to the case of the State of New York
vs. John J. Conors, et al., in which
the State of New York is the plaintiff
and John J. Conors, et al., are the
defendants. The report of the commissioner
of the State Police is as follows:

The following is a copy of the report
of the commissioner of the State Police
dated at New York, New York, on the
11th day of March, 1934, in relation
to the case of the State of New York
vs. John J. Conors, et al., in which
the State of New York is the plaintiff
and John J. Conors, et al., are the
defendants. The report of the commissioner
of the State Police is as follows:

ENCLOSURE AND OTHER ATTACHMENTS.

Wright, J. Conors
SOLISBURG, J. Conors

318A

General No. 11169

(Abstract)

Agenda 6

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - FIRST DIVISION
May Term, A. D. 1958

SOLEM MACHING COMPANY a Corporation,

Appellee,

vs.

GEORGIA LUMBER & VENEER COMPANY,
a Corporation,

Appellant.

8 I.A. 21 547
Appeal from the

Circuit Court of

Winnebago County

SPIVEY--J.

The plaintiff, Solem Machine Company, a Corporation, confessed judgment in the Circuit Court of Winnebago County, Illinois on two notes executed by the defendant, Georgia Lumber and Veneer Company, a Corporation. Plaintiff has its principal place of business in Winnebago County, Illinois. Defendant is a foreign corporation, licensed to do business in Illinois, with its registered office in Cook County, Illinois.

No property of the defendant is located in Winnebago County. After judgment was confessed, the defendant entered its special and limited appearance, contesting the jurisdiction of the Court over the defendant, and moved the Court to vacate the judgment on the ground that the notes upon which judgment were confessed were neither executed in that County,

A-8

Abstract

27

General No. 11163 (Abstract) (Abstract)

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DIVISION - FIRST DISTRICT

MAY TERM, A. D. 1935

81A.548

Appeal from the

Circuit Court of

Winnebago County,

SOLAR MACHINE COMPANY, a Corporation,

Plaintiff,

vs.

GEORGIA LUMBER & PAPER CO.,
a Corporation,
Defendant.

29151-2

The plaintiff, Solar Machine Company, a corporation, confessed judgment in the Circuit Court of Winnebago County, Illinois on two notes executed by the defendant, Georgia Lumber and Paper Company, a corporation. Plaintiff has its principal place of business in Winnebago County, Illinois. Defendant is a foreign corporation, licensed to do business in Illinois, with its registered office in Cook County, Illinois. No property of the defendant is located in Winnebago County. After judgment was confessed, the defendant entered its special and limited appearance, contesting the jurisdiction of the court over the defendant, and moved the court to vacate the judgment on the ground that the notes upon which judgment were confessed were neither executed in that County,

nor did the defendant reside in the county or have property in that county. Defendant did not question the legal sufficiency of the note. Affidavits and counter-affidavits were filed by the defendant and plaintiff and on a hearing the court denied the motion of the defendant to vacate the judgment.

Section 50 of Civil Practice Act, Chapter 110, Sect. 50 Illinois Revised Statutes, 1957 provides, in part:

"Any person for a debt bona fide due may confess judgment by himself or attorney duly authorized either in term time or vacation, without process. Judgments entered in vacation shall have like force and effect, and from the date thereof, become liens in like manner and extent as judgments entered in term; provided, that the application to confess judgment, whether made in term time or vacation, shall be made in the county in which the note or obligation was executed or in the county in which one or more of the defendants reside or in any county in which is located any property, real or personal, owned by any one or more of the defendants. A judgment entered by any court in any county other than those herein specified has no force or validity, anything in the power to confess to the contrary notwithstanding."

It is not disputed that the notes were prepared by Solem Machine Company in Illinois and signed by the defendant in Georgia. Also, undisputed is the fact that they were posted in the United States Mail at Toombsboro, Georgia.

It is defendant's contention that the physical act of signing the notes and posting the notes in the mail in Georgia constitutes their execution, so as to deprive the Circuit Court of Winnebago County of jurisdiction. On

nor did the defendant reside in the county or have property in that county. Defendant did not possess the legal sufficiency of the notes. Affidavits and counter-affidavits were filed by the defendant and plaintiff and on the basis of the court reached the notion of the law and the judgment.

Section 10 of Title 10, Chapter 10, Code of Georgia, 1933, in part: "Any person who is a party to a judgment or decree rendered by himself or attorney, or by his agent, in a case where the time or vacation, return process, judgment, or decree rendered in vacation shall have been made and entered, and the case thereof, become final, shall be deemed to have assented to the judgment entered in such case, and the application to confess judgment, when entered, shall be deemed to be a confession shall be made in the county in which the case or obligation was executed or in the county in which the case or obligation of the defendant reside or in any county in which the case or obligation, real or personal, owned by any one or more of the defendants, a judgment entered by any court in any county other than those herein specified has no force or validity, anything in the power to confess to the contrary notwithstanding."

It is not disputed that the notes were prepared by Solomon Machine Company in Illinois and signed by the defendant in Georgia. Also, undisputed is the fact that they were posted in the United States Mail at Toombsboro, Georgia. It is defendant's contention that the physical act of signing the notes and posting the notes in the mail in Georgia constitutes their execution, so as to deprive the Circuit Court of Winnebago County of jurisdiction. On

the other hand, the plaintiff contends that the execution of the notes were conditional and not effective until accepted in Winnebago County. A conditional sales contract which was secured by the notes is said to contain evidence of the intention of the parties that such a result was contemplated.

The contract provided that it, the contract, was to be effective when accepted and also called for the execution of the notes which are the subject of this action. Chronologically, the contract was executed and accepted before the notes were made. The notes were drawn by the plaintiff and sent by mail to the defendant. On their face, they purport to have been executed in Toombsboro, Georgia and are payable in Winnebago County. No condition is suggested which would have justified the non-acceptance of the notes by the plaintiff and it becomes all the more apparent that the notes were not conditional by reason of the fact that the notes were drawn by the plaintiff and sent for execution only.

In the case of Investors Commercial Corp. v. Metcalf, et al. 13 Ill. App. 2d 99, 140 NE 2d 924, the Court considered a contention that the note there was conditional. The court said

"The plaintiff contends that this was a conditional delivery of the note by the defendants and that delivery did not take place until there was an acceptance by virtue of some practice in the company, which was not known to the defendants at the time they made manual delivery of the note. A delivery may be conditional in the sense that it is to take effect only on the happening of a future contingency, and in order for the delivery to be conditional it must appear that there was a mutual understanding that the instrument was to be ineffective until the performance of the

the other hand, the plaintiff contends that the execution of the notes were conditional and not effective until accepted in Winnebago County. A conditional sales contract which is secured by the notes is said to constitute a pledge of the intention of the parties that such a result be accomplished. The contract provided that if, the contract, was

to be effective and accepted and also a lien for the execution of the notes which are the subject of this action. In none logically, the contract was executed and accepted before the notes were made. The notes were drawn by the plaintiff and sent by mail to the defendant. On their face, they purport to have been executed in Winnebago County, and the parties in Winnebago County. No condition is suggested which would have justified the non-acceptance of the notes by the plaintiff and it becomes all the more apparent that the notes were not conditional by reason of the fact that the notes were drawn by the plaintiff and sent for execution only.

In the case of Investors Commercial Corp. v. Metcalf, et al., 13 Ill. App. 2d 90, 140 N.E.2d 924, the Court considered a contention that the notes were conditional.

The court said

"The plaintiff contends that this was a conditional delivery of the note by the defendant and that delivery did not take place until there was an acceptance by virtue of some practice in the company, which was not known to the defendant at the time they made manual delivery of the note. A delivery may be conditional in the sense that it is to take effect only on the happening of a future contingency, and in order for the delivery to be conditional it must appear that there was a mutual understanding that the instrument was to be ineffective until the performance of the

condition. (10 C.J.S. Bills and Notes, sec. 79.) In all the cases which have come to our notice the condition is one which was imposed by the maker.

"In *Burr v. Beckler*, 264 Ill. 230, it was held that a note is not executed until delivered (cf. *George v. Haas*, 311 Ill. 382, with reference to the meaning of "executed"); and in the *Burr* case it was held that when a maker parts with possession and loses all control over the papers and all right to retake or claim them it is a valid delivery. In *George v. Haas*, 229 Ill. App. 648, (Reversed on other grounds in *George v. Haas*, *supra*), the court holds that the note having been retained after it was received, the acceptance must be deemed to have been at the place of delivery since it was there that the maker lost control over it. The question of acceptance ordinarily arises only where there has been a conditional delivery in the proper legal sense by the maker."

Here there is no evidence of a mutual understanding of a conditional delivery. Nor can the conditional sales contract be said to contain this understanding. This contract was accepted before the notes were drawn by the plaintiff and signed by the defendant. The notes were retained after receipt in the mails and so in this case we find that acceptance was at the place of delivery since it was there that the maker lost control over them.

The course of dealings between the parties indicated that the mail was the accepted method for delivery of the notes. They were sent to the defendant through the mails and returned in the same way. The plaintiff in choosing the mail to send the notes has impliedly authorized the defendant to act accordingly.

condition. (10 U.S.C. 3111 and Notes, sec. 79.) In all the cases which have come to our notice the condition is one which was imposed by the law.

In *Durr v. Heckler*, 444 U.S. 276, 40 AFTR2d 80-1000.

that a note is not considered as a condition of the law.

Notes, 311 U.S. 343, 40 AFTR2d 80-1000, 40 AFTR2d 80-1000.

"Accordingly, the law does not require the defendant to

make a note of the condition of the law, but the law

requires the defendant to make a note of the condition of the law.

delivery. In *Heckler v. Durr*, 444 U.S. 276, 40 AFTR2d 80-1000.

on other grounds. The law does not require the defendant to

make a note of the condition of the law, but the law

requires the defendant to make a note of the condition of the law.

delivery since it is a condition of the law.

over it. The law does not require the defendant to

only where there has been a condition of the law.

proper legal notice of the law.

There is no requirement of a condition of the law.

of a conditional delivery. The law does not require the

contract to be made on a conditional delivery. The law does not

require the defendant to make a note of the condition of the law.

and signed by the defendant. The law does not require the

receipt in the hands and on the part of the defendant.

once was at the place of delivery, it is not necessary that

the letter had been received over the law.

The course of delivery between the parties followed

that the mail was the accepted method for delivery of the

notes. They were sent to the defendant's address and the mail

and returned in the same way. The plaintiff is showing

the mail to send the notes and plaintiff accepted the

defendant to act accordingly.

"When the payee designates the mails as the means of transmission of a note, delivery is complete when the note is placed in the mails" I. L. P. Negotiable Instruments, Sec. 43. To like effect, Burr v. Beckler, 264 Ill. 230, 106 NE 206. "Where the parties are at a distance from each other, placing a note in the mail, addressed to the payee, constitutes a delivery of the note." Trego v. Estate of Cunningham, 267 Ill. 367, 108 NE 330.

From the foregoing authority, we conclude that the notes were delivered when deposited in the mail in Georgia and their execution was completed in Georgia.

"In confessing a judgment, the statute must be strictly complied with." Investors Commercial Corp. v. Metcalf, 13 Ill. App. 2d 99, 140 NE 2d 924.

The notes not having been executed in Winnebago County and the defendant having no property in Winnebago County, the Circuit Court of Winnebago County was without jurisdiction of the defendant and the judgment is void.

The trial court erred in denying defendants motion to vacate the judgment. The order of the Circuit Court of Winnebago County denying defendants motion to vacate judgment is reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed and Remanded.

Dove P.J. and McNeal J. Concur

"When the payee designates the mails as the means of transmission of a note, delivery is complete when the note is placed in the mails." I. L. P. Negotiable Instruments, sec. 43. To like effect, Hunt v. Heckler, 106 Ill. 130, 106 Ill. 200. "Where the parties are at a distance from each other, placing a note in the mail, addressed to and by the payee, constitutes a delivery of the note." Wells v. Wells, 106 Ill. 207, 106 Ill. 200. From the foregoing authorities, it is concluded that the notes were delivered when deposited in the mail in Georgia and their execution was completed in Georgia. "In construing a judgment, its scope must be strictly complied with." Investors v. Wells, 106 Ill. 207, 106 Ill. 200. Wells v. Wells, 106 Ill. 207, 106 Ill. 200. The notes not having been cashed in Indiana County and the defendant having no property in the State of Indiana, the Circuit Court of Indiana County was without jurisdiction of the defendant and the judgment is void. The trial court erred in denying defendant's motion to vacate the judgment. The order of the Circuit Court of Winnebago County denying defendant's motion to vacate the judgment is reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed and Remanded.

Dove P.J. and McNeal J. Concur.

384
No. 11172

Publish abstract only

Agenda 3

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, SECOND DIVISION
MAY TERM, A. D. 1958

ALL N. WUNDER
Clerk of the Appellate Court

DONALD C. ALLENSWORTH,
Plaintiff-Appellant,
vs.
FIRST GALESBURG NATIONAL
BANK AND TRUST COMPANY, a
corporation,
Defendant-Appellee.

181A²¹308
Appeal from the
Circuit Court of
Knox County, Illinois.

WRIGHT -- J.

This is an appeal from an order of the Circuit Court of Knox County, entered on February 13, 1958, dismissing the case for want of a proper complaint on file. This case was before this court on appeal at the October Term, 1957. The appeal was dismissed for the reason, among other things, that none of the orders appealed from were final orders. Donald C. Allensworth v. First Galesburg National Bank and Trust Company, 15 Ill. App. 2d 49, 145 N.E. 2d 264.

The mandate of the appellate court dismissing the appeal was filed in the Circuit Court of Knox County on November 25,

480

NO. 11112

THE NATIONAL BANK

UNITED STATES OF AMERICA

COURT OF APPEALS

IN RE

WILLIAM W. WOOD

83-101

DONALD C. WOOD

Plaintiff

vs.

THE NATIONAL BANK
AND
DONALD C. WOOD

WHICH -- 1.

This is an appeal from the order of the Circuit Court of Knox County, Tennessee, entered on November 15, 1935, in Case No. 83-101, wherein the plaintiff sought an order of appeal in the Circuit Court of Knox County, Tennessee, for the reason, among others, that none of the orders appealed from were final orders. Donald C. Wood v. First National Bank and Trust Company, 22 Ill. App. 2d 49, 143 N.E. 2d 341.

The mandate of the appellate court dissolving the appeal was filed in the Circuit Court of Knox County on November 25,

1957, and the plaintiff, Donald C. Allensworth was on that date granted leave by the trial court to reinstate the case and the case was on that date reinstated.

The record further discloses that the plaintiff without leave of court first had did on January 21, 1958, file another complaint in the cause consisting of forty-six pages. It names only one defendant, the First Galesburg National Bank and Trust Company. While it is not clear from the record the plaintiff apparently filed on that same date a motion for leave to file an amended complaint.

On February 26, 1958, the trial court after hearing on motion for leave to file amended complaint denied the motion and refused leave to file an amended complaint.

On February 13, 1958, the suit was dismissed by the court for want of a proper complaint on file.

The complaint filed in this case without leave of court consists of forty-six pages all in one count. It begins by stating that the defendant entered into a conspiracy and scheme to defraud and deceive plaintiff in other litigation and to procure for its own use certain interests in real estate.

Paragraph 1 of the complaint consists of four pages and on page three the following is stated:

"That the same conspiracy acted against plaintiff in 1923, when, Geo. A. Lawrence (deceased 1934), as head of the Galesburg and Kito County 'Organization' gave orders through

1937, and the plaintiff, George J. ...
that granted leave by the ...
and the case was ...
The record ...
leave of absence ...
another complaint ...
it was only ...
and that ...
the ...
leave ...
In ...
action for ...
and ...
On February 1, 1938 ...
for want of a proper ...
The complaint ...
consists of ...
alleging that the ...
scheme to defraud ...
and to procure for ...
Paragraph 1 of the complaint consists of ...
on page three the following is stated:

"That the same conspiracy acted against
plaintiff in 1933, when, Geo. J. ...
(deceased 1934), as head of the ...
Knox County 'Organization', gave orders through

his daughter and son-in-law, John M. Lowrie and wife, to do whatever was necessary to keep plaintiff from graduating in law at Columbia Law School, Columbia University, New York 27, New York. That John M. Lowrie prevailed upon the Dean to give unpassing marks in Torts, requiring deficiencies governed by the Dean, which were not capable of being overcome at the time, and it is now believed that they would never have been. That plaintiff was prevailed against by three others prevailed upon by Mr. Lowrie at his Father-in-Law's instigation, in the College, and that their success caused them to continue expression of their believed power."

In part of paragraph 2 of the complaint certain allegations are made concerning actions by the State's Attorney of Knox County in the year 1942 against the plaintiff. Paragraph 2 consists of two pages, and prays for special damages in the amount of \$100,000.00 against defendant bank.

Paragraph 3 consists of certain allegations against the Registered Mail Newspaper in Galesburg, Illinois.

In paragraph 4 certain allegations are made against one of the Circuit Judges of Knox County and against the Sheriff's Office and prays damages for \$5,000.00.

In paragraph 5 plaintiff makes certain allegations which occurred in 1940. Paragraph 5 consists of three and one-half pages and ends with the following language:

"That special damages of Five Hundred Thousand Dollars (\$500,000.) is not too high for what they have brought upon plaintiff through their illegal control exercised through their membership with the said con-

spiracy and scheme, and that is the sum asked as special damages."

In paragraph 6, complaint is made of actions of certain attorneys in Knox County.

In paragraph 7, complaint is made of the chairman of the Rent Control Board of Knox County and damages in the sum of \$5,000.00 is requested. Part of paragraph 8 has to do with a trip that plaintiff made to Colorado and part of paragraph 8 has to do with allegations that a certain person put strychnine poisoning in plaintiff's food.

Paragraph 9 of the complaint makes certain allegations against the Master In Chancery, State's Attorney and other attorneys, consists of three pages and ends by praying that a judgment in another case be set aside and that a new judgment be rendered.

Paragraph 9 (i) prays that a certain decree entered in another case be reversed.

In paragraph 10 it is alleged that the defendant caused the death by "imposed murder by suicide" of its small loan manager and prays damages for \$50,000.00 for the widow of the deceased small loan manager and prays that an attorney be appointed to represent the widow.

Paragraph 12 of the complaint makes certain allegations against a construction company and prays damages against the defendant bank in the sum of \$1,500,000.00.

agency and scheme, and that the sum
asked is agreed between the parties.

In paragraph 1, the plaintiff is named as certain

attorneys in New York.

In paragraph 2, complaint is made of the

Rent Control Board of New York, and that in the

\$1,000.00 is requested. The sum of \$1,000.00 is

trip that plaintiff made to Toronto and back of plaintiff
has to do with defendant's claim. Plaintiff's person and property

possessing in plaintiff's name.

Paragraph 3 of the complaint is made of the

against the Water in Toronto, and that the

attorneys, consisting of three persons and that the

judgment in another case is set aside and that the

be reversed.

Paragraph 4 (1) says that a certain person

another case be reversed.

In paragraph 10 it is alleged that the defendant caused

the death by "imposed murder by suicide" of the said

manager and grave damages for \$10,000.00 for the widow of the

deceased small loan manager and grave that the attorney be

appointed to represent the widow.

Paragraph 12 of the complaint makes certain allegations

against a construction company and grave damages against the

defendant both in the sum of \$1,200,000.00.

In paragraph 13 complaint is made against certain doctors and tells of plaintiff's experiences while in a hospital at Dwight, Illinois. Paragraph 13 also describes in minute detail his experiences upon returning home from the hospital in attempting to find certain prescriptions and his experiences with a housekeeper.

Paragraph 14 begins as follows:

"In answer to those conspirators who seek to use affliction foisted by them upon one used by them, plaintiff respectfully cites as his Counsel, the Bible, with Saint Paul as his advocate. II Corinthians XII I-10."

After the above quoted portion of paragraph 14, there follows, closely single spaced, a page and one-half of language quoted from the Bible.

Paragraph 15 begins by alleging a certain conspiracy of malpractice by certain doctors. Paragraph 15 consists of approximately two pages and ends by asking "special damages" in the sum of \$200,000.00 and also in the sum of \$1,500,000.00.

Paragraph 16 makes complaint against a certain lawyer.

Paragraph 17 begins by stating that as part of the conspiracy plaintiff was given a ticket by the Illinois State Police for not having proper sticker on his windshield.

Paragraph 18 makes certain allegations against an attorney and another person and prays judgment against them in the sum of \$200,000.00.

in paragraph 13 complaint is made that the one
and coils of plaintiff's equipment with a view to
weight, Illinois. Paragraph 14 states that
plaintiff has experienced great trouble in
in attempting to find a suitable material
experiences with a manufacturer.

Paragraph 15 states that

"In answer to the defendant's
letter to the plaintiff dated
one copy of the defendant's letter
also to the plaintiff dated
and in the defendant's letter
dated 1-10-11."

When the above stated portion of paragraph 15 is

followed, closely similar spaced, a page and a half

paragraph passed from the 15th.

Paragraph 16 states that the defendant

allegations by certain persons. Paragraph 17 states that

approximately two pages and ends by saying that the

the sum of \$100,000.00 and also in the sum of \$20,000.00.

Paragraph 18 states complaint against a certain person.

Paragraph 19 begins by stating that as part of the com-

plaintiff plaintiff was given a check of the Illinois State

office for not having proper return on the plaintiff.

Paragraph 20 states certain allegations against an attorney

and another person and says judgment against them in the sum

of \$200,000.00.

Paragraph 19 consists of two pages; paragraph 20 consists of three pages; paragraph 21 consists of one page and paragraph 22 consists of one page.

Pages 41 and 42 of the complaint contain a "summary of wrongs practiced against plaintiff in order of damage."

Page 43 of the complaint contains a "summary" of the complaint.

Pages 44, 45 and 46 contain six prayers for relief. The first prayer for relief prays for damages in the total sum of \$5,000.000.00 against five different parties for:

"directing the conspiracy resulting in control over the then Dean, Doctors and Instructors at Columbia College and Law School, Columbia University, New York 27, New York to cause plaintiff to fail in the study of Law and their attempts to prevent plaintiff from graduating from both the College and the Law School, 1919-1925."

The complaint in this case is a rambling, incoherent, disconnected, confusing resume of allegations and miscellaneous wrongs allegedly committed against the plaintiff over the past 35 years. This complaint violates the provisions of Sec. 33, Chap. 110, Ill. Rev. Stat., 1957 Edition, which provides that pleadings shall contain a plain and concise statement of the pleader's cause of action and that each separate claim or cause of action upon which a separate recovery might be had shall be stated in a separate count and that each count shall be separately pleaded, designated and numbered, and each shall

be divided into paragraphs numbered consecutively, each paragraph containing, as nearly as may be, a separate allegation.

The order of the trial court of February 6, 1958, denying the motion for leave to file the amended complaint, which was filed on January 21, 1958, without leave of court and designated a complaint, and its order of February 13, 1958, dismissing the cause for want of a proper complaint on file are affirmed.

*Am P.J.
Crown.*

O R D E R S A F F I R M E D.

CROW, P.J. and SOLFISBURG, J., Concur

be divided into paragraphs numbered consecutively, and
paragraph containing, as nearly as possible, all the
facts.

The order of the trial court of January 9, 1938,
denying the motion for leave to file a second complaint,
which was filed on January 11, 1938, is hereby affirmed,
and defendant's appeal is dismissed with costs to plaintiff.
1938, December 10, at St. Louis, Missouri.
File and returned.

Handwritten:
Owen
12/10/38

Handwritten:
Owen

CHOW, P.J. and SOFFISBURG, J., Concur.

390

A

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10168

Agenda No. 4

Dale McKinney, Father and Next Friend of
Betts Arlene Cox, a Minor,

Plaintiff-Appellant,

vs.

Ronald E. Cox,

Defendant-Appellee.

Appeal from the
Circuit Court of
Coles County

Booth, P.J.

By decree of the Circuit Court of Coles County entered on March 16, 1956, plaintiff was granted a divorce from the defendant. Both parties were represented by counsel. The decree provided that the plaintiff was to have the sole custody, control and education of the minor son of the parties, now age 4 and possibly 5 years, and that defendant should have the right of visitation with his son on alternate weekends at the home of defendant's parents from 5:00 P.M. Saturday until 5:00 P.M. Sunday, and also that defendant should have custody of his son for two weeks during his summer vacation and further the parties should have the child for a 24 hour period on alternate holidays. Since neither party appears to have objected to these provisions it may be assumed that defendant was a fit and proper person to have the visitation privileges and the custody privilege during his vacation time and that the home of his

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THE CHIEF OF POLICE
CITY OF NEW YORK

General No. 1006

RECEIVED

Date: January 1, 1964
Re: [illegible]

[illegible]

[illegible]

vs.

Joseph E. Cox

[illegible]

Post, ...

by letter of the ...
March 16, 1964, ...
both parties ...
the ...
of the ...
and that ...
son or ...
5:00 P.M. ...
should have ...
vacation and ...
period of ...
objected to ...
a fit and ...
nobody ...

parents was a fit and proper place for him to exercise these privileges and rights.

On June 26, 1957, defendant enlisted for three years in the military service and apparently such enlistment was to avoid induction and to avail himself of schooling he would not otherwise receive if inducted. At the time of the hearing on this motion the defendant was 20 years old and in the service. At the time of entering the service, the defendant made arrangements with the government for a monthly payment for the support of the child.

Very shortly after defendant's induction, the parents of defendant called at the home of plaintiff and her new husband, on a Saturday that would have constituted one of the Saturdays contemplated by the original decree and requested the child for a 24 hour visitation period. They were ordered to leave and the request was denied. Thereupon the defendant filed a petition to continue permission for the minor child to visit at the home of his parents on the alternate weekends as provided in the original decree, during the time defendant was in the military service, notwithstanding his being stationed in camp away from the home of his parents. Upon a hearing of this petition the trial court on July 26, 1957, found that it would be to the best advantage of the child to continue the original alternate weekend visitation privilege in the home of defendant's parents while he, the defendant, was in the service and thereupon decreed that the visitation privileges of the original decree be confirmed and continued and that visitation in the home

of the paternal grandparents be continued on alternate weekends from 5:00 P.M. Saturday until 5:00 P.M. Sunday. No request was made to extend the visitation privilege on holidays or the two week custody provisions during the summer, to the grandparents, and the decree does not alter the provisions of the original decree in this respect. By this appeal plaintiff seeks to reverse the decree of July 26, 1957. No question is raised in this appeal as to the fitness of the paternal grandparents or the fitness of their home. Likewise no question is raised in this appeal as to the finding of the court in the decree of July 26, 1957, that it would be to the best advantage of the child to continue the weekend visitation privileges under the conditions above outlined. Plaintiff stands on the sole ground that her rights as mother are absolute and that the court cannot continue the visitation privilege in the home of the paternal grandparents as long as the defendant is away in army service.

Plaintiff relies primarily on The People Ex Rel. Kusler v. Sheehan et al, 373 Ill. 79, 25 N.E. 2d 502; Kulan v. Anderson, 300 Ill. App. 267, 20 N.E. 2d 987, and Lucchesi v. Lucchesi, 330 Ill. App. 506, 71 N.E. 2d 920, as controlling of the question here involved. Defendant cites Lucchesi v. Lucchesi, supra, and Solomon v. Solomon, 319 Ill. pp. 612, 49 N.E. 2d 417, as controlling.

The Kulan v. Anderson case, the Lucchesi v. Lucchesi case and the Solomon v. Solomon case, all supra, were decided by the same branch of the 1st District Appellate Court with the same judges

presiding. Kulan v. Anderson, supra, is distinguished in each of the later cases. Other cases cited by plaintiff's counsel in their brief are capable of similar distinctions as was made of Kulan v. Anderson. No question of divorce was involved in The People Ex Rel Mahan v. Cheehan, et al, supra, and this case is likewise distinguished in Solomon v. Solomon, supra. The facts in the last mentioned case were, for all practical purposes, identical with the facts in the case at bar. It is our opinion that the decision in Solomon v. Solomon, supra, should be followed in resolving the question here involved. The Lucchesi v. Lucchesi case, supra, lends support to this view.

Accordingly the decree of the Circuit Court of Soler County is affirmed.

Affirmed.

Reynolds, J., and Carroll, J., concur.

support to this view.

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

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~~Abstract~~
Abstract
A

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

18 I.A.^{2d} 610

General No. 10180

Agenda No. 10

John Leisenring,)
)
Plaintiff-Appellant,)
)
vs.)
)
E. Herlan Lumber Company,)
)
Defendant-Appellee.)

Appeal from the
Circuit Court of
Sangamon County

Roeth, P.J.

This is an action for personal injuries sustained by the plaintiff when the defendant's truck ran into the rear of plaintiff's car which was stopped in a line of traffic. The jury found the defendant not guilty and the court entered judgment accordingly from which judgment this appeal is taken.

The complaint as amended charged the driver of defendant's truck with the commission of one or more of the following acts of negligence:

1. Followed plaintiff's vehicle more closely than was reasonable and prudent;
2. Neglected to keep a proper lookout;
3. Failed to keep its truck under control;
4. Failed to have its truck equipped with proper brakes;
5. Drove at an excessive rate of speed;
6. Failed to decrease speed when a special hazard existed.

~~SECRET~~

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General of the Army

John H. H. H.

1944-1945

1944

1. Major General H. H. H.

1944-1945

1944-1945

1. Major General H. H. H.

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1. Major General H. H. H.

1. Major General H. H. H.

The following facts are either admitted by the pleadings or shown by the uncontradicted evidence, to-wit: on August 13, 1954 at about 5:15 P.M. plaintiff was driving his automobile in a southerly direction on By-Pass 66. Defendant's servant was operating a 1950 G.M.C. truck with a 5 $\frac{1}{2}$ ton load in the same direction, to the rear of plaintiff's car. It was daylight, the weather was clear and the pavement was dry. On the day in question the southbound lane of traffic of By-Pass 66 was undergoing repairs close to the scene of the accident, necessitating one way traffic over the northbound lane at the point of the repairs. There was a flagman stationed on the west side of the highway in the vicinity of where the repairs were being made, who stopped and directed southbound traffic. At the time of the accident a Ready Mix truck was at the point of the repairs. As plaintiff approached this point, some 8 or 10 cars were stopped behind the Ready Mix truck in the southbound lane and plaintiff stopped his car a little less than a car's length behind the car in front of him. While in this position, defendant's truck rammed into the back end of plaintiff's car, driving it forward and into the car immediately ahead. The force of the impact was sufficient to damage the rear fenders of plaintiff's car, destroy the tail lights, bulge the sides making it difficult to open the doors, damage the front grill and radiator. At plaintiff's request a tow truck or wrecker was called by defendant's driver for plaintiff's car.

North of the point where the collision occurred, By Pass 66

is intersected by a road known as Old Rochester Road. The distance by measurement from the center of Old Rochester Road to the point where the collision occurred is 250 feet. North of the Old Rochester Road, By-Pass 66 is intersected by a railroad track. The distance by measurement from Old Rochester Road to the railroad track is 577 feet. On the day in question there was a "Road Repairs Ahead" sign on the west side of By-Pass 66, 101 feet north of the railroad. By-Pass 66 is down grade south of Old Rochester Road to the point where the collision occurred.

The witness James Schmidt testified that as defendant's truck passed the Old Rochester Road, he was seated in a truck headed east on Old Rochester Road, which was stopped at the entrance to By-Pass 66 to let traffic on By-Pass 66 clear. At this point Schmidt could and did see without difficulty, the Ready Mix truck, the flagman and the line of stopped cars. This testimony is not in any way contradicted or impeached.

The driver of defendant's truck was the only occurrence witness to testify for the defendant. He testified he entered By-Pass 66 at the junction of Route 36 which is some distance north of the point of collision. He proceeded south to the railroad tracks where he stopped his truck to look for trains. He then proceeded on south from the railroad tracks to the Old Rochester Road and as he passed that road he was travelling 30 to 35 miles per hour. The question and answer version of what then occurred so far as material is as follows:

is interested by a road known as Old Highway No. 1. The distance
by measurement from the center of Old Highway No. 1 to the center
where the collision occurred is 25 feet. The distance from the center
of Old Highway No. 1 to the center of the collision is 25 feet. The
distance from the center of the collision to the center of the
road is 25 feet. The distance from the center of the collision to the
center of the road is 25 feet. The distance from the center of the
collision to the center of the road is 25 feet. The distance from the
center of the collision to the center of the road is 25 feet.

The witness stated that the truck passed the Old Highway No. 1
truck passed the Old Highway No. 1 truck passed the Old Highway No. 1
needed each on Old Highway No. 1, which was at the time of the
to Old Highway No. 1. The witness stated that the truck passed the
could not see the truck until it was very close. The witness
the truck and the Old Highway No. 1 truck. The witness stated that
in any way contributed to the accident.

The driver of the defendant's truck was not at the scene of the
to testify for the defendant. The witness stated that the truck
at the junction of Route 25 which is where the collision occurred.
point of collision. He proceeded south on the railroad track where
he stopped his truck to look for a train. He then proceeded
south from the railroad track to the Old Highway No. 1 and as
he passed that road he was traveling on the Old Highway No. 1.
The question and answer version of what then occurred is for as
material is as follows:

Q What did you see after you passed the Rochester road?

A There was a line of traffic on down the pavement.

Q Where was that line of traffic?

A Directly south of me.

Q Which lane of traffic was that..... which lane was traffic in?

A Right lane.

Q As you came along there, what did you do with reference to your speed after passing the Rochester road?

A Started to reduce.

Q In what manner did you start reducing?

A Took my foot off of the accelerator.

Q Did you notice anything in the way of a vehicle being ahead as you came after passing the Rochester road?

A There was a white car in front of me.

Q You say "white car". What do you mean?

A A white sedan on down the road.

Q Did you find out what that was afterwards?

A Yes, sir.

Q What car was that in relation to the car that was involved in the collision afterwards?

A It was Mr. Leisenring's.

Q What was that car doing as you first observed it?

A It was slowly moving.

Q As you came along there what were you doing?

A I was slowing down.

Q Did you notice that car as it proceeded on? What was it doing?

Q What did you see after you passed the Webster road?

A There was a line of traffic on down the highway.

Q There was that line of traffic?

A Through center of road.

Q Which lane of traffic was that? Which lane was the traffic in?

A Right lane.

Q As you were going down the road, did you see any other cars?

A Started to follow.

Q Is that correct did you start following?

A Look my car all the time.

Q Did you notice anything in the car of a white sedan as you came after passing the Webster road?

A There was a white sedan.

Q Did you see that car?

A A white sedan on down the road.

Q Did you find out what car was following?

A Yes, sir.

Q That car was that it related to the car that was involved in the collision afterwards?

A It was Mr. Leisner's.

Q What was that car doing as you first observed it?

A It was slowly moving.

Q As you came along there wasn't any other cars?

A I was alone down.

Q Did you notice that car as it proceeded on? That was it going?

A No, no particular attention.

Q Did you notice anything unusual

A No sir.

Q Did you afterwards as you went along notice anything unusual about the car?

A No sir.

Q What was the first thing you did notice in reference to this automobile?

A All of a sudden he stopped.

Q As you went along there about how fast were you traveling when you say you saw this car slowing down?

A Oh, twenty-five (25) to thirty (30).

Q When you say you observed something different about the car, what did you observe or see different?

A He apparently was sitting still.

Q Had you been watching the car during that time?

A Yes sir.

Q Well how far were you from the car at that time in your best judgment?

A Around one hundred (100) feet..... a hundred and fifty (150), something like that.

Q Well after the impact of the two (2) vehicles what did you do?

A I got out of the truck.

Q Did you see Mr. Leisenring there?

A I did.

Q What did he do?

A He was walking around.

Q Did he talk with you?

A No, no parties for attention.

Q Did you notice anything unusual.....

A No sir.

Q Did you afterwards go and went about the city?

A No sir.

Q What was the first thing you did after you got to this automobile?

A All of a sudden he started.

Q As you went along, I suppose you saw some other cars?

A Yes, I saw a few cars, but I didn't see any other cars.

Q On, twenty-five (25) to thirty (30) cars?

Q When you say, you observed a car, what did you observe in the car?

A He apparently was sitting still.

Q Did you hear him in the car when you saw him?

A Yes sir.

Q Well how far away from him did you see him?

A About one hundred (100) feet, I think like that.

Q Well after you looked at the car (25) or thirty (30) feet?

A I got out of the car.

Q Did you see Mr. Williams?

A I did.

Q What did he do?

A He was walking around.

Q Did he talk with you?

A He did.

Q Did he ask you or say anything to you?

A He asked me why I hit him.

Q Did you answer that?

A I did.

Q What did you answer?

A I told him I simply couldn't stop.

And on cross examination the driver of defendant's truck testified.

Q So you were about five (5) to ten (10) feet on south of the center of the old Rochester road when you first saw the line of cars up there?

A That is right.

Q Is that correct?

A That is right.

Q How far ahead of those cars.... ahead of you were those cars at that time?

A A hundred and fifty (150) feet.

Q When you..... when did you first see the Leisenring car that you later hit?

A After I come around the old Rochester road.

Q Did you see it at the same time you saw the line of cars or afterwards?

A There was this one car in the line.....

Q The line of cars was stopped wasn't it?

A I had no knowledge that it was stopped.

Q What I am asking you is whether or not you know whether that line of cars..... any of them were stopped or not?

A I don't know.

A He did.

Q Did he ask you or say anything to you?

A He asked me why I hit him.

Q Did you answer that?

A I did.

Q What did you answer?

A I told him I wasn't coming to school.

Q And on cross examination the driver of defendant's truck testified.

Q So you were about five (5) to ten (10) feet on each side of the center of the old Rochester road when you saw the line of cars there?

A That is right.

Q Is that correct?

A That is right.

Q How far ahead of those cars... ahead of you were those cars at that time?

A A hundred and fifty (150) feet.

Q When you... when did you first see the telephone box that you later hit?

A After I came around the old Rochester road.

Q Did you see it at the same time you saw the line of cars or afterwards?

A There was... told me say in the line....

Q The line of cars was stopped wasn't it?

A I had no knowledge that it was stopped.

Q When I am asking you is whether or not you know whether that line of cars... any of them were stopped or not.

A I don't know.

Q You didn't know? They may have been or may not have been?

A They may or may not.

Q What did you do when you first observed that line of cars there?

A Took my foot off of the accelerator.

Q Then what did you do?

A I was going down the road.

Q Then did I understand you to say that at some point of time you applied the brakes?

A Yes, I did.

Q Where were you when you applied your brakes?

A Between one hundred (100) and one hundred and fifty (150) feet, somewhere along there.

Q Did you suddenly realize they were stopped down there, did you?

A Yes sir.

Q You, when you were about one hundred feet away you realized they were stopped?

A That is right.

Q You didn't see them come to a stop, you realized they were stopped, isn't that right?

A They were apparently stopped, yes.

Q You realized at that point of time that they were stopped?

A That is right.

Q Well what speed were you traveling as you approached the point of the impact, within the last one hundred to one hundred fifty (150) feet of the accident?

A I wouldn't want to say exactly.

Q To your best judgement?

A The last hundred (100) feet?

Q You didn't know? They may have been or may not have been.

A They may or may not.

Q What did you do when you first observed the fire on the
there?

A Took my foot off the accelerator.

Q Then what did you do?

A I see some dark smoke.

Q Then did I understand of you that you saw some smoke of
time you started to move?

A Yes, I did.

Q Where were you when you started?

A I was in a position where I was driving and I saw the
fire, towards the front.

Q Did you call out anything when you saw the fire?
did you?

A Yes sir.

Q You, when you saw the fire, did you say anything?
did they hear you?

A That is right.

Q You didn't see them come to a stop, you noticed they
were stopped, is that right?

A They were stopped, yes.

Q You noticed it when you saw the fire, was that correct?

A That is right.

Q Well what speed were you traveling at? I supposed the
point of the impact, within the last 50 yards to the hundred
feet (100) feet of the accident.

A I wouldn't want to say exactly.

Q To your best judgment?

A The last hundred (100) feet.

Q The last hundred (100) to one hundred fifty (150) feet, yes.

A Somewhere between twenty-five (25) ... thirty (30)... maybe twenty (20).

Q Did you try to stop?

A I did.

Q How far away from the point of impact were you when you tried to stop?

A I said around a hundred (100) feet, somewhere.

Q And the brakes wouldn't stop the car within that one hundred (100) feet distance, isn't that correct?

A They had slowed to almost a stop.

Q Am I correct that the car that the brakes on your car did not stop the truck within one hundred (100) feet when you had the brakes on?

A You are.

The witness further testified that he did not see the "Road Repairs Ahead" sign, the flagman or the Ready Mix truck prior to the collision.

We have set out the foregoing testimony of the servant of the defendant because of the contention by counsel for plaintiff that the liability of the defendant was clearly proved by the judicial admissions of the servant of defendant. With this contention we agree. The subject of judicial admissions was discussed at length in Tennes v. Tennes, 320 Ill. App. 19, 50 N.E. 2d 132, and quite recently in Huber v. Black and White Cab Co., 18 Ill. App. 2d 186, 151 N.E. 2d 641. The testimony heretofore set out brings it within the judicial admissions category. This testimony

Q The last hundred (100) to one hundred fifty (150) feet.
Yes.

A Somewhere between twenty-five (25) ... thirty (30) ...
maybe twenty (20).

Q Did you try to stop?

A I did.

Q How far away from the point of impact were you when you
tried to stop?

A I said around a hundred (100) feet, or there.

Q And the brakes wouldn't stop the car within that one
hundred (100) feet distance, is that correct?

A They had slowed to almost a stop.

Q As I correct that "almost a stop" ... that the driver or you
car did not stop the truck within one hundred (100) feet when
you had the brakes on?

A Yes, sir.

The witness further testified that he did not see the "Load Light
Ahead" sign, the sign on the heavy six truck prior to the
collision.

We have set out the foregoing testimony of the service of
the defendant because of the contention by counsel for plaintiff
that the liability of the defendant was clearly proved by the
judicial admissions of the servant of defendant. With this con-
tention we agree. The subject of judicial admissions was discussed
at length in Larson v. Tupper, 320 Ill. App. 17, 50 S.W.2d 132,
and quite recently in Hyder v. Black and White Oil Co., 18 Ill.
App. 2d 186, 151 N.E. 2d 641. The testimony heretofore set out
brings it within the judicial admissions category. This testimony

constitutes clear, deliberate, and unequivocal statements of facts within the peculiar knowledge of the witness, which clearly substantiate one or more of the charges of negligence alleged in the complaint as amended. From this testimony it is apparent that the driver of the truck could not, when confronted with the situation with which he was confronted, stop his truck within 100 to 150 feet. It is likewise apparent that the fact that he could not stop was one that was peculiarly within his knowledge. This fact leaves room for no other inference than that defendant's servant was guilty of one or more of the charges of negligence alleged. Ceeder v. Kowach, 17 Ill. App. 2d 202, 149 N.E. 2d 766.

Defendant's counsel counter with the suggestion (which has the appearance of a smoke screen) that coupled with the element of negligence, is the question of due care of the plaintiff before liability can be resolved and that the question of plaintiff's due care was a jury question. It is suggested that because the servant of the defendant testified that he did not see any tail stop lights on plaintiff's car and did not see plaintiff give any arm signal of stopping, the jury could infer that no such signals were given and could from this determine the due care of the plaintiff as a jury question. This argument overlooks the undisputed fact that the collision occurred in the daytime when the weather was clear and the pavement dry and the undisputed fact that the situation existing at the scene of the collision, including the flagman and stopped cars, was clearly visible for at least 250 feet north of the collision. But most important, this argument

constitutes clear, deliberate, and unequivocal intent to do
harm within the peculiar knowledge of the victim, which clearly
substantiates one or more of the charges of negligence alleged
in the complaint as set forth. From this testimony it is apparent
that the driver of the truck could not, when confronted with the
situation with which he was confronted, stop his truck. It is
to 150 feet. It is likewise apparent that the truck was not
not stop was one that was reasonably foreseeable. It is
fact leaves room for no other inference or conclusion.
servant was guilty of the same negligence as the master.
alleged. See Decker v. Decker, 10 Ill. App. 2d 100, 101, 102, 103.
Decker's conduct was negligent (which was
the appearance of a woman crossing) and caused the elements of
negligence, in the question of the master's liability, before
liability can be resolved on the question of negligence.
due care and a jury verdict. It is concluded that because the
servant of the defendant was negligent, the defendant is liable.
stop lights on plaintiff's car and the fact that plaintiff's
are signs of stopping, the jury could not find that plaintiff
were given and could find that plaintiff was negligent of the
plaintiff as a jury question. It is concluded that plaintiff
proved that the collision occurred in the city when the
weather was clear and the pavement dry and the defendant foot that
the situation existing at the scene of the collision, including
the flagman and stopped cars, was clearly visible for at least
250 feet north of the collision. But most important, this argument

overlooks the unequivocal statement of the servant of defendant himself, that he was fully aware of the situation confronting him when he was between 100 feet and 150 feet of the point of impact. We cannot comprehend how the due care of the plaintiff can be seriously questioned. Whether seriously questioned or not, there is no legal basis for the question being raised.

Defendant's principal contention is (a) that there is no proof that the negligence of the defendant was the proximate cause of plaintiff's claimed condition of ill being or (b) whether or not the claimed condition of ill being was caused by defendant's negligence was a jury question and even though the jury found for the plaintiff on the question of liability, still the verdict can stand if the jury believed that the claimed condition of ill being was not caused by the negligence of defendant. As to contention (a), we have carefully examined the record with reference to the claimed condition of ill being, particularly with regard to determining whether there is any proof to support plaintiff's theory that the collision aggravated a pre-existing arthritic condition in the cervical vertebrae. There is ample evidence in the record to support this theory and to make it a jury question. As to contention (b), the same contention was made in Edwards v. Fly, 317 Ill. App. 599, 47 S.E. 2d 344, under a comparable condition of the record. After an exhaustive analysis of the question it was held to be without merit.

After the jury's verdict of not guilty, plaintiff filed a post trial motion consisting of a motion for judgment notwith-

[illegible]

standing the verdict and a motion for new trial. The essence of these motions is that the trial court enter judgment for the plaintiff finding the defendant guilty and grant a new trial on the question of damages. It is our opinion that the judgment of the Circuit Court of Sangamon County should be reversed and the cause remanded with directions to enter judgment finding the defendant guilty, and that the cause be submitted to a jury for new trial solely as to the question of damages to be awarded plaintiff.

Reversed and remanded with directions.

Carroll, J., and Reynolds, J., concur.

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18 LA 21 611

Agenda No. 2

100

Appeal from the
Circuit Court of
Douglas County

Four Slot Machines and Coins therein,

$$\frac{11}{17} \qquad \frac{1}{17} \qquad \frac{1}{17}$$

Defendant-Intervenor-Appellant.

This is an appeal by the Tri-City Country Club of Villa Grove, Illinois, an Illinois corporation, defendant-intervenor, from a judgment of the Circuit Court of Douglas County, whereby 4 slot machines taken from the possession of said corporation were ordered destroyed.

On the night of May 31, 1957, the Sheriff of Douglas County accompanied by 2 other police officers, entered the premises of defendant-intervenor (hereinafter referred to as defendant) and

Abstract

STATE OF ILLINOIS
CIRCUIT COURT
JUDICIAL DISTRICT

May Term, A. D. 1933.

22
23

1135-1136

Verdict No. 2

General No. 1016

People of the State of Illinois vs.
James H. Rice, Sheriff of Lawrence
County, a local authority,
Plaintiff-appellee,
vs.
Four Rice Machine and Tool Works,
Inc.,
Defendant-appellant.

People of the State of Illinois vs.
James H. Rice, Sheriff of Lawrence
County, a local authority,
Plaintiff-appellee,
vs.
Four Rice Machine and Tool Works,
Inc.,
Defendant-appellant.

CAUSE NO. 1.

This is an appeal by the Four Rice Machine and Tool Works, Inc., an Illinois corporation, defendant-appellant, from a judgment of the Circuit Court of Lawrence County, Illinois, entered in 1932 wherein taken from the possession of said corporation were ordered destroyed.

On the night of May 21, 1932, the Sheriff of Lawrence County accompanied by 2 other police officers, entered the premises of defendant-appellant (hereinafter referred to as defendant) and

seized and took into his possession 4 slot machines which he found therein. None of the officers had a warrant authorizing the search of the premises or the seizure of the machines.

On June 3, 1957, the People, (referred to herein as plaintiff), filed a petition in the Circuit Court of Douglas County alleging that the machines were in the possession of the Sheriff; and that the same are and were at the time of their seizure, gambling devices, per se. The petition prayed summons for defendant, Tri-City Country Club, in whose possession the machines were found and for an order directing the Sheriff to destroy the same. The defendant filed its' motions to dismiss the petition and to suppress the evidence and return the property to defendant. The grounds urged in the said motion are that the slot machines had been seized after an illegal entry and search of defendant's property in violation of the Fourth Amendment to the Constitution of the United States and of Sec. 6 of Article II and Sec. 10 of Article II of the Constitution of Illinois. It is further recited in the motion that there was then pending a criminal proceeding against the defendant based upon the facts alleged in plaintiff's petition. Subsequently, defendant filed a supplemental motion to dismiss the petition on the ground that the court lacked jurisdiction to grant the prayer thereof under the provisions of Chap. 38, Par. 342, Ill. Rev. Stats. 1955, because petitioner failed to proceed under Div. VIII of the Illinois Criminal Code. Thereupon, the court ordered the proceeding transferred to the civil docket. It was stipulated between the parties that there was a criminal case pending in a police magistrate's court in which

joined and took into his possession the said property which he found therein. None of the officers has a written acknowledgment of the proceeds of the seizure of the property.

On June 1, 1931, the said property was returned to

plaintiff, filed a petition in the Circuit Court of Cook County

alleging that the said property was in the possession of the

and that the same was in the possession of the said property

officers, yet so. The said property was returned to the

City County Court, in which a petition was filed for the

for an order directing the said property to be returned to

defendant. The said property was returned to the said

the evidence and return of the said property. The said property

in the said notice and that the said property was returned to

an illegal entry or return of the said property in violation of

the Fourth Amendment to the Constitution of the United States

of Sec. 6 of Article IV, Sec. 10 of the Constitution

of Illinois. It is further alleged in the said petition

then pending a criminal proceeding against the said property

the facts alleged in plaintiff's petition. The said property

filed a supplemental petition to amend the petition of the

that the court issued an order to return the said property

the provisions of Art. 3, Sec. 10, of the Constitution

petitioner failed to proceed under Art. 3, Sec. 10, of the

Good. Therefore, the court ordered the proceedings transferred to

the civil docket. It was stipulated between the parties that there

was a criminal case pending in a police court in which

defendant was charged with possessing gambling devices.

After hearing evidence, the court overruled the motion to dismiss the petition. The defendant then filed an answer in which it admitted ownership and possession of the machines but denied that the same are gambling devices, per se. The defendant further answering, denied the petitioner's allegation that the machines should be summarily destroyed as gambling devices held, owned and used in violation of Sec. 2 of "An Act to Prohibit the use of Clock, Tape, Slot or other machines or devices for Gambling Purposes", App. June 21, 1895, as amended, then in force and effect.

Upon a hearing on the petition and answer, the court found the 4 slot machines to be gambling devices per se and ordered the destruction of the same by the Sheriff of Douglas County. The record indicates no dispute as to the fact that the devices seized were slot machines which were found in the possession of defendant.

Defendant contending that the trial court erred in failing to hold that the machines in question were seized in violation of its constitutional rights under Sec. 6, Art. II and under Sec. 10 Art. II of the Illinois Constitution, appealed directly to the Supreme Court. Finding that the appeal was wrongfully taken to that court, the Supreme Court transferred the case to this court.

Consistent with its theory that a construction of the constitution is involved, and therefore an appeal would lie directly to the Supreme Court, defendant's 'Points and Authorities' and

defendant was charged with possessing gambling devices.
After hearing evidence, the court overruled the motion to
dismiss the petition. The defendant then filed an answer in which
it admitted ownership and possession of the machines but denied
that the same are gambling devices, etc. The defendant further
answering, denied the petitioner's allegation that the machines
should be summarily destroyed as gambling devices, and that they
used in violation of Sec. 2 of the Act to Regulate the Sale of Liquor,
Iowa, that no other machine or device for gambling purposes,
App. June 21, 1937, as a result, that in 1937 and 1938,
Upon a hearing on the petition in 1937, the court found
that the machines to be gambling devices, and ordered the
destruction of the same by the Sheriff of Jackson County. The record
indicates no dispute as to the fact that the machines seized were
also machines which were used in the possession of defendant.
Defendant contends that the State failed to prove in failing
to hold that the machines in question were used in violation of
the constitutional rights under Sec. 2, Art. I of the Iowa Constitution.
Art. II of the Illinois Constitution, applied directly to the
Supreme Court. Finding that the appeal was wrongfully taken to
that court, the Supreme Court affirmed the case to this court.
Consistent with the theory that a violation of the
constitution is involved, and therefore an appeal would lie directly
to the Supreme Court, defendant's 'points and authorities' and

'argument' appear to be confined entirely to the constitutional questions which it sought to present to that court. In its' brief under the heading "errors relied upon for reversal", defendant assigns as error certain rulings of the trial court on the admission of evidence at the hearing on the petition. However, these allegations of error are not included under 'Points and Authorities' and no argument or citation of authority supporting the same is found in the brief except as it appears in connection with defendant's contention that the 4 slot machines were seized in violation of its constitutional rights and therefore improperly admitted in evidence.

Obviously, thus the defendant argues only the constitutional question. Since defendant does not argue these assigned errors other than those involving constitutional questions, the same are deemed waived and accordingly we need not consider them. (Rule 7 of the Rules of Practice of the Appellate Courts of Illinois).

Since in its' brief defendant presents and argues only constitutional questions which by transfer from the Supreme Court have been resolved adversely to defendant's contentions, there remains nothing for this court to determine. The rule applicable in such situation is stated in Armin F. Hillmer v Harley L. Clarke, 316 Ill. App. 445 (Abst.) as follows:

'argument' appear to be confined entirely to the constitutional question which it sought to present to that court. In its brief

under the heading 'errors relied upon for reversal', defendant assigns as error certain rulings of the trial court on the admission of evidence at the hearing on the petition. However, these allegations of error are not included under 'factual and legal' and no argument or citation of authority supporting the same is found in the brief except as it appears in connection with defendant's contention that the state machines were seized in violation of its constitutional rights and therefore improperly admitted in evidence.

Obviously, the defendant's argument is a constitutional question. Since defendant's contention is that the state machines were seized in violation of its constitutional rights, the same are deemed waived and accordingly are not presented for review of the trial court's ruling on the petition (see 100 Cal. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

"The only questions argued and the only points presented in plaintiff's brief involve the constitutionality of the provision of the Banking Act authorizing the discharge of insolvent stockholders and a construction of sec. 6 of article XI of the Illinois constitution. These questions having been resolved adversely to plaintiff, there remains nothing for us to determine. Plaintiff evidently realized the position in which the opinion of the Supreme Court left him, for on petition for rehearing, which was denied by the Supreme Court, he made the following statement (p. 3, petition for rehearing): 'By transferring this case to the Appellate Court this court is in effect holding that there are no constitutional questions in the case, since the Appellate Court has no jurisdiction to pass upon such questions. The decision of the court amounts to an adverse holding on the constitutional questions raised by appellants!'"

For the reasons indicated, the judgment of the Circuit Court is affirmed.

Affirmed.

Roeth, P. J., and Reynolds, J., concur.

"The only questions argued and the only points presented in Plaintiff's brief involve the constitutionality of the provision of the Banking Act authorizing the discharge of insolvent stockholders and a question of sec. 6 of article III of the Illinois constitution. These questions having been resolved adversely to Plaintiff, there remains nothing for us to determine. Plaintiff evidently reached the position in which the opinion of the Supreme Court left him, for on petition for rehearing, which was denied by the Supreme Court, he made the following statement (p. 2, petition for rehearing): 'By transposing this case to the Appellate Court this court is in effect holding that there are no constitutional questions in the case, since the Appellate Court has no jurisdiction to pass upon such questions. The decision of the court amounts to an adverse ruling on the constitutional questions raised by appellants.'"

For the reasons indicated, the judgment of the Circuit

Court is affirmed.

Attest.

Witness my hand and the seal of the Court at Springfield, Illinois, this 10th day of June, 1908.

395
46799

A. S. THOMAS,

Appellee and Cross-Appellant,

v.

ROMAN J. KOWALEWSKI, et al.,

Defendants.

On Appeal of JOSEPHINE E. RICHARDS and
K. A. RICHARDS,

Appellants and Cross-Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

18 I.A.²¹ 612

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is a creditor's suit to satisfy plaintiff's judgment out of an alleged equitable estate in a parcel of real estate, not otherwise subject to levy and sale under execution, pursuant to the provisions of section 49 of the Chancery Act, Ill. Rev. Stat. 1939, Ch. 22, par. 49. This court reversed a trial court decree in favor of the plaintiff and remanded the cause with instructions to dismiss the suit for want of equity. Thomas v. Kowalewski, 12 Ill. App. 2d 283 (1956). This judgment was reversed by the Supreme Court of Illinois and the cause remanded to this court for further proceedings not inconsistent with the opinions expressed. Thomas v. Richards, 13 Ill. 2d 311 (1958).

The suit filed November 22, 1940, is based upon a judgment of October 29, 1940, for \$21,556.65, entered on a confession note for \$15,748, executed by Nellie Kowalewski and her husband, Roman, on November 5, 1935.



The complaint alleged the judgment of October 29, 1940; that it was still in full force and effect, unpaid and unsatisfied; that execution had been issued and returned, no part satisfied; that the real estate in question was held in trust for Nellie and Roman Kowalewski by Josephine and Richard Kowalewski, their daughter-in-law and son (who by decree on July 5, 1949, changed their surname to Richards); that Roman and Nellie held some equitable interest in the real estate; and prayed for a determination thereof and that plaintiff be decreed to have a first lien thereon and the sheriff be directed to sell the real estate in satisfaction thereof.

The real estate in issue is known as 1259 West 51st Street, Chicago, Illinois, improved with a 2-story brick office and apartment building. It was acquired by Nellie Kowalewski on June 3, 1925, when she and her husband executed a purchase money mortgage of \$20,000. On June 30, 1925, they executed a second mortgage on the premises for \$25,000.

On February 13, 1932, a suit seeking foreclosure of the second mortgage was filed, and thereafter on August 4, 1932, a foreclosure suit was filed by holders of the first mortgage. Thereupon, the foreclosure of the second mortgage was abandoned, and on June 10, 1933, a decree of foreclosure of the first mortgage was entered, finding \$19,080.88 due, and that the mortgage was a first and prior lien on the property, its rents, issues and profits. On July 6, 1933, a sale was held pursuant to the foreclosure decree, the holders of the first mortgage, the Belniaks and Kintzes, purchased the property at the sale, and a

and of the
Horticultural Society, the Horticultural Society,
was a little more than 100 years old
and profitable. On July 1, 1911, the
Horticultural Society, the Horticultural Society,
Belmont and Linton, purchased the property

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master's certificate of purchase was duly issued and recorded on July 21, 1933. The master's sale was approved on January 22, 1937, and a deficiency decree for \$1,598.69 entered. On April 18, 1935, a master's deed to the property to the first mortgage holders was issued and recorded. There was no appeal from the foreclosure decree. On November 4, 1935, a quitclaim deed from Nellie and Roman Kowalewski to Richard, their son, dated June 4, 1930, was recorded. On November 5, 1935, the second mortgage trust deed and note, then owned and held by B. Byer, were exchanged for the note made by Nellie and Roman, for \$15,748, payable to Byer or order, and basis of the confession judgment sought to be collected in the instant suit.

The second mortgage had been held by the Sherman bank, for which a receiver had been appointed, and was part of a number of desperate assets transferred by the bank receiver to his attorney (who later represented B. Byer), pursuant to an order of court entered on March 27, 1935, in part payment of \$10,291.09 attorney's fees.

On or about December 18, 1936, there was recorded a quitclaim deed dated December 16, 1936, from Richard Kowalewski to Josephine Kowalewski, his wife. On January 4, 1937, a quitclaim deed dated September 30, 1936, from the master's grantees (the Belniaks and Kintzes, senior mortgage holders) to Josephine Kowalewski was recorded. Thereafter, Josephine and her husband, Richard, conveyed to a family-owned corporation in June, 1937, and on August 20, 1940, there was recorded a warranty deed from the corporation, conveying the property back to Josephine.



The instant creditor's suit of November 22, 1940, was referred to a master in chancery for hearing of evidence in November, 1948. On June 16, 1955, the master's report was approved. The master found the equities in favor of plaintiff, and the decree now before this court was entered on June 30, 1955.

The decree adopted all of the findings of the master and found that there was a fiduciary relationship between Richard and his mother from June 1, 1930, to January 1, 1937; that there was a conspiracy between them and Josephine, the purpose and object of which was to disturb, delay, hinder and defraud the creditors of Nellie; and decreed that commencing on September 30, 1936, Josephine held the legal title to the real estate in question for the use and benefit of Nellie Kowalewski, the equitable owner, and her judgment creditors; and that neither Richard nor Josephine ever had any right, title or interest excepting the naked legal title in trust for Nellie and her judgment creditors.

Josephine E. Richards and K. A. Richards (formerly Kowalewski) appealed from the decree. The Supreme Court decided (reversing this court's decision) that plaintiff, by filing this suit, obtained a lien which survived the death of Nellie and Roman Kowalewski, and that by filing the suit and service of process, plaintiff acquired a lien upon the real estate, and it was wholly unimportant that the final decree establishing the lien and ordering a sale was not rendered until long after the judgment at law had ceased to be a lien by force of the statute upon the real estate of the judgment debtor, reaffirming and following the rule set forth in Davidson v. Burke, 143 Ill. 139. The final judgment



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of this court was confined to that phase of the case, and we did not pass on other questions raised. Under the Supreme Court mandate, we shall now pass on those questions.

The important question is whether or not the evidence in the record establishes a constructive trust of the subject property in favor of Nellie Kowalewski and her creditors.

Without regard to the findings of the master on any particular question of fact, the final question in this court is: Was the decree rendered by the court a proper one under the law and evidence? Zilvitis v. Szczudlo, 409 Ill. 252, 255 (1951); Vesolowski v. Vesolowski, 403 Ill. 284, 292.

There are many authorities in Illinois defining what constitutes the foundation for a constructive trust. In a recent case, Carroll v. Caldwell, 12 Ill. 2d 487 (1957), at pp. 493, 494, it is said:

"Constructive trusts, on the other hand, arise by operation of law from circumstances which stamp the conduct of a person unfair or wrongful and permit him to take advantage of another. (Fowley v. Braden, 4 Ill. 2d 355; Restatement of Trusts, sec. 44). They are divided into two general classes, one being where actual fraud is considered as equitable ground for raising the trust, and the other being where the existence of a confidential or fiduciary relationship and a subsequent abuse of confidence arising therefrom, are sufficient to establish the trust. (Ridgely v. Central Pipe Line Co., 409 Ill. 46; Kester v. Crilly, 405 Ill. 425; Steinmetz v. Kern, 375 Ill. 616). * * *



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The important question is whether or not the evidence in the record establishes a constructive trust of the subject property in favor of Nellie Kowalewski and her creditors.

In a chancery case, the facts are found by the court, and the master's report, while prima facie correct, is of an advisory nature only. The facts are all open for consideration in the first instance by the trial court, and afterwards by this court in case of appeal. Without regard to the findings of the master on any particular question of fact, the final question in this court is: Was the decree rendered by the court a proper one under the law and evidence? Zilvitis v. Szczudlo, 409 Ill. 252, 255 (1951); Vesolowski v. Vesolowski, 403 Ill. 284, 292.

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" * * * Fraud is never presumed and can be alleged or proved, both at law and in equity, only by allegation and proof of facts constituting the fraud. (Anderson v. Anderson, 339 Ill. 400; 19 I.L.P., Fraud, sec. 36)."

Even if a fiduciary relation exists, a conveyance to the dominant party, executed by the dependent party, will not be affected, unless by means of such fiduciary relation undue advantage has been taken of the grantor. Peters v. Meyers, 408 Ill. 253 (1951); Neagle v. McMullen, 334 Ill. 168. It is not the existence of the fiduciary relationship which alone is the ground for raising a constructive trust, but it is necessary that there also be some evidence of undue influence, by virtue of which one has obtained the legal title to property which he ought not to have secured under the rules of equity and good conscience. Scherman v. Scherman, 395 Ill. 574 (1947); Peters v. Meyers, supra.

The relationship of parent and child did not itself establish a fiduciary relationship between Richard Kowalewski and his parents, Roman and Nellie. Moore v. Moore, 9 Ill. 2d 556, 560. It was the burden of plaintiff to prove a fiduciary relationship in which the dominant party took advantage of the other and abused the relationship, and to make that proof by evidence, clear, convincing, strong, unequivocal and unmistakable, so as to lead to but one conclusion (Kapraun v. Kapraun, 12 Ill. 2d 348 (1957)), that Richard was the fiduciary of Nellie (his mother) when title was available for reacquisition from the senior mortgagees and should have caused title to be conveyed to her.

Nellie Kowalewski died June 8, 1947, and Roman died July 23, 1950. They did not testify nor did the Belniaks and Kintzes.



Josephine Richards, called as an adverse witness, testified that Richard, her husband, took care of all of the details of the acquisition of the title and arranged for the financing through loans secured by the premises. She did not put up any money at the time the deed was acquired from the Belniaks and the Kintzes, and did not know them, but did use her money for additional expenses; that she and Richard had discussed the purchase of the premises "and when these people, Belniaks and Kintzes, were asking him (Richard) several--every time he paid rent, we finally talked it over and he thought it would be a good idea to buy it, and that is how we came to buy it. We bought it from Belniaks and Kintzes. * * * he (Richard) did mention that his father and mother had to sign a note for the release of the second mortgage and they paid some moneys on account also, but I wasn't interested in it, because like I say, I wasn't interested in what his father and mother did. I was only interested in what I was going to do. * * * the whole transaction was handled by my husband."

The record shows that on September 10, 1936, the Kintzes and Belniaks gave Richard a written 10-day option to purchase the real estate for \$14,000, payable \$10,500 in cash and \$3,500 by a junior mortgage, to be subject to a mortgage of \$12,000 to be made by Richard. On October 1, 1936, Lillian Beutler certified that she was holding a deed to Josephine from the Kintzes and Belniaks, to be delivered within sixty days if she received \$10,500 cash and a third mortgage of \$3,500, subject only to a first of \$8,000 and a second of \$4,000.



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The transfer of title and funds was accomplished through a Chicago Title & Trust Company escrow. After preliminary negotiations, the escrow agreement was executed on December 30, 1936. There were three trust deeds and three sets of notes executed by Richard and Josephine and secured by the premises in question. The funds from two of these mortgages were placed in escrow. (1) The first mortgage was for \$8,000, dated October 3, 1936, and the funds for this loan came from the Talman Federal Savings & Loan Association. (2) The second mortgage was for \$4,000, dated October 22, 1936, and the funds for this loan came from Joseph Rajk, a neighbor of Richard. (3) The third mortgage was placed in the escrow and consisted of two notes totalling \$3500. One note was for \$2,000 and ultimately delivered to the Belniaks, and the other for \$1,500 was delivered to the Kintzes. The Chicago Title & Trust Company required Richard to execute a quitclaim deed to Josephine, dated December 16, 1936. On February 25, 1937, it disbursed the funds in escrow--\$5,985 to the Belniaks and \$4,515 to the Kintzes.

In addition to using the funds derived from the mortgage loans for the purchase of the premises in question, Richard claimed that \$417 additional was paid to the Talman Federal Savings & Loan Association in connection with the first mortgage expense, out of funds belonging to Josephine. In corroboration of this, there were received in evidence two checks totalling \$290, signed "Josephine Kowalewski by Richard R. Kowalewski," and receipts to Richard and Josephine for the balance.



Richard testified both as an adverse witness and for the defense and answered written interrogatories. He was in the real estate and insurance business since 1928, and since 1930 resided in and conducted business in the premises in question. He collected and retained the rents from the premises from June 4, 1930, to January 1, 1937, and kept no records of receipts and disbursements. No receiver was appointed during the foreclosure proceedings. Richard made arrangements with the senior mortgage holders and Otto H. Beutler, their attorney, to pay \$50 a month for the entire premises. In 1930, he negotiated an extension agreement with the holders of the first mortgage, at which time \$2500 was paid on account of the principal of the notes, and his parents executed an extension agreement for the balance. Additional amounts paid at that time consisted of \$600 past due interest and a loan renewal commission of \$350. All payments were made by checks of R. J. Kowalewski Real Estate Company, which was dissolved on June 29, 1933. Under his own name he negotiated with the Home Owners Loan Corporation from December 29, 1933, to November 8, 1935, in an effort to re-finance the property. On November 5, 1935, he and his parents worked out the exchange of the second mortgage paper for the note, the collection of which is the basis of this suit.

He also testified that on or about June 4, 1930, his parents executed and delivered him a quitclaim deed to the premises, dated June 4, 1930, for which he paid \$3500. He borrowed \$3,000 from Rose Belakiewicz and repaid her in installments. This quitclaim deed he recorded November 4, 1935.

He destroyed the records of R. J. Kowalewski Real Estate Company and of R. J. Kowalewski and Sons. His testimony shows and the master found that his parents were insolvent on June 3, 1930, and at all times thereafter. During this period his mother (Nellie) was a housewife, and his father had political jobs from time to time.

Plaintiff's evidence shows conclusively that the quitclaim deed, which Richard testified was executed June 4, 1930, was on a form not printed before 1932; that by deed dated June 7, 1937, title to the premises was conveyed by Josephine and Richard to R. J. Kowalewski and Sons, Inc., after which Richard made unsuccessful efforts to procure a \$20,000 first mortgage on the premises; that the corporation reconveyed the premises to Josephine on June 22, 1940; that it was incorporated in Illinois on April 13, 1936, and dissolved in 1943; the incorporators were Roman, Sr., Roman, Jr., Richard and Edward, with the corporate address being 1259 West 51st Street; that the Talman mortgage loan was released in 1940 and Richard held the release deed in his possession and recorded it April 20, 1950.

The master found that Richard had knowingly and willfully testified falsely on at least two material matters: the actual date of the execution of the quitclaim deed, dated June 4, 1930, and recorded November 4, 1935, and on the question as to whether his father, Roman J., was a director of R. J. Kowalewski and Sons, Inc., in 1937 and 1940, and that the entire testimony of Richard was therefore to be disregarded, except insofar as corroborated by other credible evidence or by facts and circumstances proved on trial; that where a party to litigation



deliberately destroys documents, all presumptions will be indulged against him; that it appeared in the case that subsequent to the institution of the instant suit, he destroyed all the books and records of R. J. Kowalewski and Sons, Inc., and at some unspecified date destroyed all records showing his receipts and disbursements from his management of the real estate for the period from June 1, 1930, to January 1, 1937; that during that period Nellie was the owner of the equity, and all rents and profits belonged to her; that the amount retained by Richard during this period substantially exceeded the sum claimed by him to have been expended in acquiring title in January, 1937, and that the acquisition of title by Richard in Josephine's name must be regarded as having been accomplished with the funds of Nellie, his principal, and as having created a resulting trust in favor of Nellie; that where one person acts as the agent of another in regard to certain real estate, a fiduciary relationship is presumed as a matter of law, and if the agent acquires the legal title to the property the law will presume a constructive trust in favor of the principal, even though the purchase price was furnished by the agent alone; that when Richard, through Josephine, acquired title to said real estate, a constructive trust was thereby created in said real estate in favor of Nellie; that Josephine has always held legal title under a constructive trust for Nellie, which trust inured to the privies of Nellie, that is, her heirs and her creditors; that the conduct of Richard on November 5, 1935, in securing the cancellation of the old second mortgage and substituting therefor the new note of Nellie and

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Her mother
November 11, 1911
Sergeant and Lieutenant

Roman for \$15,748, and the recordation on November 4, 1935, of a deed from Nellie to Richard, falsely dated June 4, 1930, showed a conspiracy between Richard and Nellie to disturb, delay, hinder and defraud the creditors of Nellie, particularly the holders of said \$15,748 note; and recommended the entry of a decree in favor of plaintiff.

There is sufficient evidence in the record to find that Richard was endeavoring to refinance the property in question for his parents up to November 5, 1935, and that he may have been acting as their agent in the collection of the rents. There is no evidence as to a fiduciary relationship or agency extending beyond November 5, 1935.

The finding of the master that the net rents retained by Richard during June 1, 1930, and January, 1937, substantially exceeded the amount claimed by him to have been expended in acquiring title in January, 1937, is not based on the record but on his conclusion. The record contains checks totalling \$290, drawn on Josephine's account and used in the acquisition of title, and there is no affirmative evidence to show there was any excess of rents after paying \$50 a month to the first mortgage holders and the expenses incident to the maintenance of the building.

A constructive trust is founded upon fraud, either actual or constructive. The record does not sustain the finding of a constructive trust in favor of Nellie and her creditors or that there was a conspiracy between Richard, Nellie and Josephine to defraud the creditors of Nellie. The record is barren of any

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evidence to show any fiduciary relationship between Richard and Nellie, whereby Richard overreached or abused his relationship with his parents, either before or after November 5, 1935, although Richard may have been guilty of false testimony and questionable title maneuvers. In fact, the finding that Richard abused the fiduciary relationship with his mother is hardly consistent with the finding that he conspired with her to defraud her creditors by taking title in his wife's name. If she conspired with her fiduciary, it cannot be claimed that he abused a position of trust as to her.

His parents were insolvent continuously from June, 1930. The record contains an appraisal report, dated June 28, 1937, showing the then market valuation of the premises to be \$14,000, and as the premises had been sold to the senior mortgage holder for \$19,000 to satisfy a first mortgage lien in excess of \$20,000, it is evident that his parents had no equity in the premises. The deficiency decree was for \$1,598.69, and there was due on the second mortgage the sum of \$15,748. Both parents being insolvent and with the property encumbered far beyond its then market value, it was useless to continue his efforts to refinance the premises for his parents after November 5, 1935. On that date and at the time of the note exchange, Richard, in the presence of his parents, said to the attorney representing the second mortgage holder, "You know my father and mother have nothing. What are you going to do with this note?" and the attorney replied in substance that he proposed to collect it. This made it apparent that any further attempt to refinance or reacquire the property for themselves

would only result in losing it again to their unpaid creditors. The recording on November 4, 1935, by Richard of the quitclaim deed to him, dated June 4, 1930, purporting to convey a legal title, hopelessly encumbered and under mortgage foreclosure, does not show an abuse of confidence or an overreaching of his parents or confer any "benefit" on Richard. That quitclaim deed was not the basis through which Josephine was found to have acquired the legal title. The master found that Josephine acquired the legal title by a quitclaim deed from Jacob and Anna Belniak and Julia and Helen Kintz, as grantors to her as grantee, said deed being dated September 30, 1936, and recorded January 4, 1937, and that she had title in fee simple.

Josephine purchased the legal title through Richard's negotiations and financial arrangements, and the evidence does not justify the inference or finding that Nellie participated in bringing about the transaction. The unimpeached testimony of Josephine is that the purchase was made by her and Richard pursuant to the repeated urgings of the Belniaks and Kintzes.

The evidence in this case and the picture portrayed thereby do not clearly, convincingly, unmistakably and unequivocally prove "that when title was available for reacquisition from the senior mortgagees, Richard should have caused title to be reconveyed to Nellie, his fiduciary."

We do not believe that the record justifies a finding of a conspiracy to defraud the creditors of Nellie Kowalewski. It is unnecessary to establish a conspiracy by direct testimony,



and a conspiracy may be proved by circumstantial evidence and by inferences reasonably deduced from the facts proved, but the evidence must exclude every inference other than that sought to be established. 11 I.L.P. 117, Ch. 2, §36; Roeder v. Pipe, 235 Ill. App. 89, 106 (1924). Nellie and Roman were in no position to contribute to the conspiracy. They could not have taken the property in their own names because of their desperate financial situation. The recordation on November 4, 1935, of the quitclaim deed to Richard, falsely dated June 4, 1930, to property which then had no value to the legal title holder, and the negotiation by him for the cancellation of a valueless junior encumbrance, does not reflect any attempt to conceal assets of his mother. The attorney representing B. Byer had commenced junior mortgage foreclosure proceedings in 1932 and subsequently abandoned them. No testimony was given by him as to any misrepresentations made to him by Richard in negotiating the exchange of notes, and it is obvious that he would not have consented to the note exchange unless he was of the opinion that the junior mortgage was valueless as a lien on the premises. There was no confidential relationship between B. Byer and any of the Kowalewskis.

There is nothing in the record to conclude that knowledge of the falsely dated deed and its recordation would have affected the junior mortgage and note exchange, because the placing of the legal title in Richard did not enhance the value of the lien of the second mortgage. There is no evidence that Josephine participated in any of these negotiations. There is no direct testimony of any conspiracy, and we do not believe that the circumstantial evidence, i. e., the title



manipulations, by inferences reasonably deduced therefrom, prove a conspiracy between Richard and his mother and Josephine to defraud the creditors of Nellie, nor is every other inference necessarily excluded.

After a very careful consideration of the evidence and of the authorities cited by counsel for both sides, we are convinced that the evidence adduced in this cause is not sufficient to establish a constructive trust upon the property in question. It is our opinion that the decree of the trial court is not a proper one under the law and evidence. The acquisition of title by Richard and Josephine, according to the record, did not proceed from a betrayal or abuse of any fiduciary relationship or confidence between Richard and his parents, or from any conspiracy to defraud the creditors of Nellie Kowalewski.

Accordingly, said decree is reversed and the cause is remanded with directions to dismiss the case for want of equity.

REVERSED AND REMANDED
WITH DIRECTIONS.

LEWE, P.J., AND KILEY, J., CONCUR.

ABSTRACT ONLY.





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